

NOTES AND COMMENTS

"SUBSTANTIALLY TO LESSEN COMPETITION . . .": CURRENT PROBLEMS OF HORIZONTAL MERGERS

ALTHOUGH the antitrust laws of the United States police diverse business activities, essentially they are variations on a single theme—the preservation and promotion of a rationally competitive economy.¹ Monopoly market power achieved by consolidation of competing units, an abuse which characterized the nineteenth-century "trust," was proscribed by the Sherman Act, as interpreted by the Supreme Court in 1904.² But the Sherman Act could not attack attainment of such power until the process was virtually completed.³ Conse-

1. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1, 316-18, 334 (1955) [hereinafter cited as ATT'Y GEN. REP.]; SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 43-44 (1948). Generally, competition is subject to certain statutory proscriptions in order to ensure a healthy atmosphere for its continued existence. Thus the qualification in text ("rationally") acknowledges the laws' less than complete adherence to a philosophy of free and open competition. See Levitt, *The Dilemma of Antitrust Aims*, 42 AM. ECON. REV. 893 (1952) (inherent hypocrisy in the antitrust laws' censure of competition's most successful practitioners); Letwin, *The Origins of Antitrust Policy*, 64 J. POL. ECON. 156, 158 (1956). See also *Pearsall v. Great No. Ry.*, 161 U.S. 646, 676-77 (1896); *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945); Robinson, *Imperfect Competition Revisited*, 63 ECONOMIC J. 579, 592 (1953). Moreover, unrestrained competition has been deemed harmful in certain areas of the economy. See Clark, *The Orientation of Policy*, 40 AM. ECON. REV. 93 (Supp. 1950) ("Judging by existing laws and policies, the American people do not want unrestricted competition in the sale of labor, in agriculture, and in local trade."). See also Hale & Hale, *Competition or Control—I: The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958).

2. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (consolidation of two railroads producing monopoly power held to violate Sherman Act); Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179, 187-93 (1932); Canfield, *The Northern Securities Decision and the Sherman Anti-Trust Act*, 4 COLUM. L. REV. 315 (1904).

The passage of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952), as amended, 15 U.S.C. §§ 1-3 (Supp. V, 1958), was prompted by public antipathy towards the trust. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 319 (1897); Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173 (1932); Stocking, *Attorney General's Committee's Report: The Businessman's Guide Through Antitrust*, 44 GEO. L.J. 1, 2 n.3 (1955); THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954). For a description of the "trustification" of American industry between 1898 and 1904, see HOFSTADTER, *THE AGE OF REFORM* 168-69, 225-54 (1955). It has been claimed, however, that the Sherman Act was directed to the problem of oligopoly. MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 350 (1952) [hereinafter cited as MACHLUP]. *Contra*, Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 32 (Supp. 1950).

3. The act did extend to giant corporations which, through (a) external expansion by partnership, merger, and combination with both competing and noncompeting concerns,

quently, courts were confronted with the task of dismembering huge corporations, and effective enforcement was deterred by fear that dissolution would result in economic disruption.⁴ To remedy this and other weaknesses of the Sherman Act, Congress enacted the Clayton Act in 1914. Section 7 of the act was specifically directed at the evils of competitor acquisition.⁵

The section's promise lay in its adoption of an incipency doctrine; the probability of substantial injury to competition was prohibited, and the need to show that fullblown monopoly power would result from a corporate consolidation was eliminated.⁶ Three different criteria for the illegality of a merger were provided. The first, whether a merger's effect "may be to substantially lessen competition between the corporation . . . acquired and the corporation making the acquisition," evoked the most judicial discussion and confusion. Unworkable if construed literally⁷—any merger eliminates competition "between" the consolidated corporations⁸—the language was given effect only

and (b) internal expansion said to have been aided by predatory trade practices, had achieved monopoly power. See *Standard Oil Co. v. United States*, 221 U.S. 1, 42-43, 75 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). But serious doubts arose after these cases as to the ability of the act to reach corporations of less than monopoly power. See articles cited note 4 *infra*. These doubts were apparently confirmed by subsequent Sherman Act litigation. See *United States v. International Harvester Co.*, 274 U.S. 693 (1927); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

4. See Adams, *Dissolution, Divorcement, Divestiture: The Phryrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951); Bowman, *Incipency Mergers, and the Size Question: Section 7 of the Clayton Act*, 1 ANTITRUST BULL. 533, 534 (1956); Dewey, *Romance and Realism in Antitrust Policy*, 63 J. POL. ECON. 93, 99 (1955); Oppenheim, Timberg & Van Cise, *Divestiture as a Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 119 (1950); Wood, *The Supreme Court and a Changing Antitrust Concept*, 97 U. PA. L. REV. 309, 337-40 (1949).

5. Clayton Act, § 7, 38 Stat. 731 (1914). The first paragraph read:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

See H.R. REP. NO. 627, 63d Cong., 2d Sess. (1914); S. REP. NO. 698, 63d Cong., 2d Sess. (1914); Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411, 414 (1916); Stevens, *The Clayton Act*, 5 AM. ECON. REV. 38 (Supp. 1915); Irvine, *The Uncertainties of Section 7 of the Clayton Act*, 14 CORNELL L.Q. 28 (1929).

6. See Levy, *supra* note 5; Comment, 57 YALE L.J. 613, 620 (1948); Comment, 39 YALE L.J. 1042 (1930).

7. See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 526-27 (2d Cir. 1958). In *Swift & Co. v. FTC*, 8 F.2d 595, 597 (7th Cir. 1925), *rev'd on other grounds*, 272 U.S. 554 (1926), the court read the statute literally. After the FTC found that two local Georgia meat packers acquired by Swift had previously competed with Swift, the court did not inquire into the substantiality of their competition.

8. A stock acquisition by a holding company may be an exception. See *Pennsylvania R.R. v. ICC*, 66 F.2d 37, 39 (3d Cir. 1933), *aff'd by an equally divided Court*, 291 U.S. 651 (1934). See also *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656, 661 (3d Cir. 1931).

when a substantial percentage of the total goods marketed by the acquired and acquiring firms were sold in competition with each other.⁹ In other cases, the "between" requirement was ignored, and the market shares of the corporations were viewed in proportion to the total market; only when the merging firms accounted for a substantial share of industry sales as a whole would illegality follow.¹⁰ The second and seldom-employed test was whether the result of the merger "may be . . . to restrain commerce in any section or any community."¹¹ Finally, the statute prohibited mergers the effect of which "may be to . . . tend to create a monopoly in any line of commerce."¹² Generally, courts emphasized the significance of the merging firms in the industry under all tests; liberally interpreting the statute, it was found, in a market of few sellers, that a merger of corporations with seven per cent and five per cent of total industry sales could violate the act.¹³

Despite its potential, section 7 did not become an important antitrust weapon. Limited to mergers effected through stock acquisition—apparently then the principal method of corporate consolidation¹⁴—it was easily evaded by merging through direct purchase of assets.¹⁵ Indeed, a stock acquisition was beyond attack if converted to an asset acquisition anytime before the issuance of the Government's divestment order.¹⁶ Eventually, even enforcement

9. Compare *International Shoe Co. v. FTC*, 280 U.S. 291, 299 (1930) (merger legal since only 5% of the merging firms' products sold in competition) (alternative holding), and *United States v. Associated Press*, 52 F. Supp. 362, 374 (S.D.N.Y. 1943), *aff'd on other grounds*, 326 U.S. 1 (1945) (competition between the acquiring and acquired firms "trivial" and not substantial), with *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 65 F.2d 336, 340 (2d Cir. 1933), *rev'd on other grounds*, 291 U.S. 587 (1934) (merger illegal since 59% of merging firms' sales competing), and *Baltimore & O.R.R.*, 152 I.C.C. 721, 726 (1929) (merger illegal when 91% of acquired firm's business competitive with acquiring firm's).

10. See *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 124 (N.D. Ohio 1935); *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656, 660 (3d Cir. 1931) (alternative holding).

11. See *National Supply Co. v. Hillman*, 57 F. Supp. 4, 7 (W.D. Pa. 1944).

12. See *V. Vivaudou, Inc. v. FTC*, 54 F.2d 273, 275 (2d Cir. 1931); *Aluminum Co. of America v. FTC*, 284 Fed. 401, 407 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923); cf. *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 168-69 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953).

13. *Vanadium-Alloys Steel Co.*, 18 F.T.C. 194, 203-04 (1934); see *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 65 F.2d 336, 340 (2d Cir. 1933), *rev'd on other grounds*, 291 U.S. 587 (1934) (merger illegal where merging firms made 24% of industry sales); *Aluminum Co. of America v. FTC*, *supra* note 12.

14. See KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM* ch. 1 (1954); Comment, 52 COLUM. L. REV. 766, 768-69 (1952).

15. For an exposition of the various methods of merger, see U.S. FTC, *REPORT ON CORPORATE MERGERS AND ACQUISITIONS* ch. IV (1955). See also Fuld, *Some Practical Aspects of a Merger*, 60 HARV. L. REV. 1092 (1947).

16. See *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934); *Thatcher Mfg. Co. v. FTC*, 272 U.S. 554 (1926).

agencies viewed section 7 as a dead letter.¹⁷ The proliferation of corporate consolidations in the postwar years highlighted the need to strengthen the statute.¹⁸ Furthermore, oligopoly, a market structure characterized by a few powerful sellers, was increasingly recognized as a detriment to competition,¹⁹ and *United States v. Columbia Steel Co.*²⁰ brought into bold relief the inability of the Sherman Act to cope with mergers which resulted in fewness of producers. Thus, in 1950, Congress attacked corporate consolidation with a "new" section 7, not because of concern with the growth of monopoly, but in order to stem the tide of increasing oligopoly.²¹

THE RELEVANT GEOGRAPHIC MARKET

One crucial problem of interpretation of the new statute is market definition. The interrelationship of market delineation and standards of illegality in section 7 cases is readily apparent. By restricted definition, courts may con-

17. See *Hearing on H.R. Rep. No. 2734 Before a Subcommittee of the House Committee on the Judiciary*, 81st Cong., 1st Sess. 23 (1949); TNEC, *Final Report and Recommendations*, SEN. DOC. NO. 35, 77th Cong., 1st Sess. 38-40 (1941); *Hearings on H.R. 2357 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 79th Cong., 1st Sess. 66-86 (1945).

18. See generally U.S. FTC, REPORT ON CHANGES IN CONCENTRATION IN MANUFACTURING (1954); BURNS, THE DECLINE OF COMPETITION 1, 3, 40 (1936); Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 166-72 (1947); Celler, *Monopoly and Small Business in the Year Ahead*, 3 ANTITRUST BULL. 375, 378 (1957); *Hearings on H.R. 1840, S. 11, and S. 780 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 6 (1956). In the period 1951-1954, three corporate mergers occurred every two days, and half of all mergers involved companies with over \$10 million in assets. U.S. FTC, REPORT ON CORPORATE MERGERS AND ACQUISITIONS ch. III (1955); see Harris, *The Urge To Merge*, *Fortune*, Nov. 1954, pp. 102, 103 ("mergers of important U.S. industrial corporations are taking place at the astonishing rate of about forty-five a month," and the value of assets combined equals 10% of the total for all United States industrial corporations); Bock, *Mergers and Market Size—1. Product Dimensions*, 16 CONFERENCE BOARD BUS. RECORD [hereinafter cited as CONF. BD. BUS. REC.] 192, 193 (1959) (between Jan. 1, 1951, and Dec. 31, 1958, there were 6,526 total or partial acquisitions recorded by the FTC); *Mergers: An Analysis of 1958 Listings*, 16 CONF. BD. BUS. REC. 238, 241 (1959) (1,116 firms were acquired in 1958 resulting in 822 consolidated units, almost 50% of which possess in excess of \$10 million in assets). But see Wilcox, *On the Alleged Ubiquity of Oligopoly*, 40 AM. ECON. REV. 67, 73 (Supp. 1950).

19. See, e.g., FELLNER, COMPETITION AMONG THE FEW (1949). For one description of oligopoly, see MACHLUP 348-49, 352. See also Note, 64 YALE L.J. 1049 (1955).

20. 334 U.S. 495 (1948) (acquisition by U. S. Steel of a fabricating plant which would have foreclosed 3% of the market for rolled steel to competition, and might have resulted in U. S. Steel's controlling 24% of a fabricating market area, permitted). The Court was cognizant of the philosophy of § 7 of the Clayton Act banning mergers substantially lessening competition, but did not view the antimerger statute as controlling. *Id.* at 507 n.7. But see Note, 58 YALE L.J. 764 (1949) (restricting the specific result of the case to its "peculiar" facts). See also Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 788 (1949).

21. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952). The section now reads in part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole

struct product ("line of commerce") and geographic ("section of the country") markets far more concentrated, and in which the merging corporations have a much larger share, than would appear if the markets were broadened to include a greater variety of products or additional regions of the country. Or, overly restrictive market definition may put the merging firms in separate markets and unjustifiably frustrate the statute. A market definition which is too broad may improperly dilute market shares and exonerate the merger or, alternatively, exaggerate the power of the merging firms by including areas and products in which they are sellers, but which are irrelevant to the competitive impact of the consolidation.

The problem of market delineation is not unique to section 7 cases, but is also of strategic importance in other antitrust litigation in which illegality is related to the degree of power and concentration in markets. Thus, precedents involving the Sherman Act and section 3 of the Clayton Act²² may be relevant for section 7 purposes.²³ The most fundamental inquiry in defining the appropriate market in a merger case is whether the two firms are selling in competition with each other. Only firms who sell competing goods in competing places could, by combining, increase their power over price and entry. Ob-

or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The amendment's purpose, *inter alia*, was "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions." S. REP. NO. 1775, 81st Cong., 2d Sess. 3 (1950); see H.R. REP. NO. 1191, 81st Cong., 1st Sess. 8 (1950); Celler, *Monopoly and Small Business in the Year Ahead*, 3 ANTITRUST BULL. 375, 379 (1957). For legislative history of new § 7, see Comment, 46 ILL. L. REV. 444 (1951); Note, 52 COLUM. L. REV. 766 (1952); cf. Comment, 57 YALE L.J. 613 (1948).

The amendment closed the asset loophole. Further, the market wherein competition was to be measured was restated; no longer was competition between merging companies determinative, see note 9 *supra*, but rather that throughout the relevant market. Finally, Congress articulated its desire to have the statute apply to vertical and conglomerate as well as horizontal mergers. See H.R. REP. NO. 1191, 81st Cong., 1st Sess. *supra*; S. REP. NO. 1775, 81st Cong., 2d Sess. *supra*.

This Comment will treat only the subject of horizontal mergers and acquisitions, which appear to be the chief concern of enforcement agencies. See Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 513-18 (1957). For descriptions of vertical and conglomerate mergers, see MACHLUP, *THE POLITICAL ECONOMY OF MONOPOLY* 81-126 (1952); U.S. FTC, *REPORT ON THE MERGER MOVEMENT* 29-63 (1948).

22. See, e.g., *United States v. Columbia Steel Corp.*, 334 U.S. 495, 514 (1948) (Sherman Act § 1); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (Sherman Act § 2); *Standard Oil Co. v. United States*, 337 U.S. 293, 299 (1949) (the *Standard Stations* case) (Clayton Act § 3).

23. But see *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 592 n.34, 593 n.36 (S.D.N.Y. 1958) (doubting the applicability of Sherman Act market definition precedents in § 7 cases).

viously, firms are not competitors unless they sell products which, in the eyes of buyers, are reasonably interchangeable. Thus, the courts have employed a concept of product substitutability²⁴—the lawyers' version of the economists' "cross elasticity of demand"²⁵—as determinative of the product market. The imponderables of classifying products as substitutable or nonsubstitutable have been developed at some length by both courts²⁶ and commentators.²⁷ Less attention has been accorded the equally important problem, especially under section 7, of ascertaining the extent to which firms compete in the same section of the country.

The only sections which are relevant for section 7 purposes are those in which both merging firms are "significant market participants." In demarcating the outer limits of these sections, the courts have referred to the "area of

24. See, e.g., *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (the *Cellophane* case) ("reasonable interchangeability . . . price, use and qualities considered," is the test for defining the product market); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957) (the *du Pont-General Motors* case) ("sufficient peculiar characteristics and uses . . . constitute . . . products sufficiently distinct . . . to make them a 'line of commerce' within the meaning of the Clayton Act"); *International Boxing Club v. United States*, 358 U.S. 242, 249-52 (1959) (harmonizing *Cellophane* and *du Pont-General Motors* and requiring "a sufficiently separate part of the trade or commerce").

25. See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 530 (2d Cir. 1958) ("sensitivity to price change" relevant to determining "cross-elasticity of demand"); STIGLER, *THE THEORY OF PRICE* 48-49 (rev. ed. 1952) ("The cross-elasticity . . . defines economic substitution . . . [and] provides a convenient basis for defining a commodity . . .").

26. Section 7 cases discussing this issue include *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957) (other finishes and fabrics not substitutable for automotive finishes and fabrics); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 529 (2d Cir. 1958) (beet sugar substitutable for cane sugar); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 591-93 (S.D.N.Y. 1958) (various types of steel pipe not substitutable; nonferrous metal and plastic pipe not substitutable for steel pipe; used oil field equipment not substitutable for new oil field equipment); *Erie Sand & Gravel Co.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27644, at 36812 (Dec. 17, 1958) (pit sand not substitutable for lake sand); *Brillo Mfg. Co.*, No. 6557, FTC, Nov. 26, 1958, at 2-3 (other industrial abrasives not substitutable for steel wool); *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36458-59 (1957) ("trade coarse paper" including paperboard not substitutable for "Census coarse paper," including wrapping papers, bag and sack papers, and converting papers).

27. See, e.g., Bock, *supra* note 18; Gesell, *Legal Problems Involved in Proving Relevant Markets*, 2 ANTITRUST BULL. 463 (1957); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 308-13 (1956); Comment, 58 COLUM. L. REV. 1269, 1272-77 (1958); Note, 54 COLUM. L. REV. 580, 585-94 (1954) (collecting earlier cases and authorities).

28. *Standard Oil Co. v. United States*, 337 U.S. 293, 299-300 n.5 (1949) (the *Standard Stations* case) (petroleum products in seven-state "Western area" in Clayton Act § 3 action); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 595-96 (S.D.N.Y. 1958) (series of regional markets in steel industry); see S. REP. NO. 1775, 81st Cong., 2d Sess. 5-6 (1950) (citing *Standard Stations* criteria).

effective competition,"²⁸ or the "natural selling area."²⁹ But how may courts distinguish the "effective" from the ineffective, or the "natural" from the unnatural? To begin the inquiry, a producer is a "market participant" whenever he may sell without facing disabling competitive disadvantages in relation to other producers. The producer's "significance" in the geographic market varies in direct proportion with the magnitude of its selling capabilities in relation to rival plants. In defining relevant geographic sections, the most important of these capabilities is transportation costs from plant to market lower than or equal to those of competitors.³⁰

If the enterprise is one in which freight is a proportionately insignificant cost, the complexities of delimiting an appropriate geographic market do not arise. Nonfreight advantages are reflected nationally; profits and sales can be uniform throughout the country. Thus, the market for jewelled watches has been held to be nationwide.³¹ Even with such products, particularly effective salesmen or advertising may, at least temporarily, render a producer dominant in a particular regional area. But such a firm is not insulated from competing producers by freight costs, and any competitor might be able to dilute its market share in a relatively short period of time; an attempt to raise prices in the favored area would hasten this result. The geographic region relevant to a particular producer's competitive status should not, therefore, be restricted to a particular area on such transitory grounds.

In industries in which freight costs are important—such as those which produce goods of low value in relation to high bulk—a plant may be able to serve only particular areas effectively. To define the relevant geographic market for firms in such industries, courts must therefore draw a line, representing the outer limits of the region in which the plant is a significant market participant, around each plant of the merging companies. Participation will diminish in rough accordance with freight costs to various destinations from the plant. But the region in which a plant participates is determined not by transportation costs alone, but by freight combined with other factors. Lower production costs, more efficient management and organization, greater good will, improved process, more harmonious labor relations, better distributional outlets, or access to raw materials will increase a firm's ability to make sales,

29. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 397-98 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524, 529 (2d Cir. 1958) (refined sugar in ten-state "River Territory"); *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36459 (1957) (eleven-state Western area the "natural market" for "coarse paper products").

30. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 514, 529 (1948) (eleven-state Western area for semifinished steel products in Sherman Act § 1 proceeding); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, *supra* note 29, at 398, 259 F.2d at 529; *Crown Zellerbach Corp.*, *supra* note 29, at 36459.

In the case of foodstuffs, perishability may also be a crucial factor limiting the area of shipment. Note, 54 COLUM. L. REV. 580, 597-98 (1954).

31. *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

and thus allow it to compete in a given area with rivals who confront lower freight costs but who have fewer nonfreight advantages, or who are taking a higher profit per unit sold.³² And no fixed guide is available for determining where participation is so diminished as to be irrelevant under the statute.³³ Concrete facts, in addition to freight costs, on which to base this determination are the plant's complete costs and records of the plant's past shipments to various points. Past shipment figures may present an imperfect picture of past sales when they show fluctuating demand among scattered buyers, reflect temporary shortages, or are available only on the basis of state political boundaries, which are unrelated to product distribution patterns.³⁴

Information on a plant's costs may be even less useful in delineating the relevant region for section 7 purposes. Bare cost data does not encompass all the factors which determine the market strength in a given area.³⁵ In addition, the cost data of different firms may be too complex and variegated to permit a proper estimate of the selling capabilities one firm may have in a particular locality.³⁶ For example, it is not ineluctably true that a firm which operates at less than full capacity, and therefore does not sell in a distant region, is at a permanent competitive disadvantage in that region, when compared with a firm whose cost savings derived from full-capacity operations allow it to reach faraway sections of the country.³⁷ Normally, therefore, past shipments will serve as the best measure of the region of significant market participation.³⁸

Once the court has set forth regions representing the significant participation of each plant, the regions where merging firm *A* overlaps merging firm

32. See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 599 n.44 (S.D.N.Y. 1958) (lower cost production enables plant to overcome freight cost barriers).

33. See S. REP. NO. 1775, 81st Cong., 2d Sess. 5-6 (1950); *United States v. Bethlehem Steel Corp.*, *supra* note 32, at 602.

34. See *ibid.* ("there is nothing sacred about the boundary lines of a state"). But in most cases where regional markets are appropriate only statewide figures are available. See cases cited notes 28-30 *supra*.

35. See text at note 33 *supra*.

36. One of the myriad factors which must be considered is variations in available transportation rates. For example, Bethlehem's Maryland plant ships steel products via the Panama Canal to the West Coast, and is a significant market participant in that area. 168 F. Supp. at 600. Midcontinent plants, because of higher rail charges, are impotent in the Far West. Brief for Defendants, June 23, 1958, pp. 36-38.

37. In *Bethlehem*, the court found that fuller capacity operations allowed Bethlehem consistently to ship into the midcontinent area from distant Eastern plants, 168 F. Supp. at 599.

38. The courts and FTC have relied almost wholly on records of past shipments. See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 601-02 (S.D.N.Y. 1958); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 390-91 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524, 529 (2d Cir. 1958); *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36459 (1957); Comment, 58 COLUM. L. REV. 1269, 1271-72, 1278 (1958) ("The most direct method of proving the probability of a substantial lessening of competition is to show that in a particular area, a substantial percentage of the total sales made are made by each of the combining companies.").

B constitute the sections in which consolidated *AB* would acquire enhanced market participation. The areas of overlap are thus relevant geographic markets in which to apply section 7 tests of illegality.³⁹ And in implementing the statute's mandate that a merger is illegal if competition is likely to be substantially lessened in "any" section of the country, a court would be justified in defining more restrictive markets within the areas of overlap.⁴⁰ In the widest areas in which both firms effectively sell without facing disabling competitive disadvantage, the firms may not have sufficient overall market power to warrant prohibition of the merger. Nevertheless, within the overlap area, a narrower region may exist in which the merging firms have significant advantages over all others. Thus, a merger may involve a substantial lessening of competition in a particular region, even though the effects of the consolidation throughout the entire overlap area are not anticompetitive. The question then arises as to the extent to which smaller areas, in which plants of the merging firms have particular advantages, should be deemed relevant markets for the purposes of section 7. Again, no fixed rule determines whether a particular cluster of buyers constitutes a "section of the country." But too

39. In *Bethlehem*, the court adopted a nationwide market in which the share of the merging firms (about 21%) exceeded their share in most regional markets. 168 F. Supp. at 594, 597-98, 602. In future cases, a nationwide market for such products, including areas in which neither firm has made or appears capable of making shipments, could result in unwarranted exoneration of the merger. In *American Crystal Sugar*, the court referred to the nationwide status of the merging firms, 152 F. Supp. at 397, but measured the competitive consequences only in a ten-state section; indeed, a nationwide market probably would have resulted in no violation. But the *Bethlehem* court's finding of a nationwide market, particularly for pig iron and raw steel ingot (included in the "iron and steel industry" product market, 168 F. Supp. at 594) appears more appropriate in view of the vertical aspects of the merger, *id.* at 611-14, and the high degree of vertical integration of the merging firms and the industry as a whole. Control of iron ore supplies, see note 245 *infra*, and the effect upon national buyers were important, 168 F. Supp. at 611 (shipments by Bethlehem and Youngstown to "common customers" in Michigan and Ohio—primarily the national automobile producers—represented 40% of their combined sales in those states). See Pillsbury Co., 3 TRADE REG. REP. ¶ 27846, at 36917 (FTC March 11, 1959) ("the necessary tendency . . . [of the horizontal acquisition] is to prevent the smaller . . . manufacturers from selling their products to chain stores and super-markets").

40. See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (S.D.N.Y. 1958) (in addition to nation as a whole, the following regional areas held relevant for semifinished steel products: the northeast quadrant of the United States; Michigan, Ohio, Pennsylvania, and New York; Michigan and Ohio; Michigan; and Ohio); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (in addition to the ten-state "river territory," a three-state area within that territory is of "economic significance" and conforms to "commercial realities"); *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923 (1957) (within eleven-state Western area the "evidence is . . . sufficient to show that the three Pacific Coast states, California, Oregon, and Washington, constitute a section of the country, within the meaning of Section 7"); Bock, *Mergers and Market Size—2. Geographic Dimensions*, 16 CONF. BD. BUS. REC. 285, 286 (1959).

narrow market delineation could ban all but the most trivial mergers,⁴¹ a result apparently not intended by Congress.⁴²

THE RELEVANCE OF MARKET STRUCTURE

Once the market is defined, the problem of measuring the effect of a merger on competition is confronted. Aside from revealing an early emphasis on market structure, old section 7 decisions provide slight assistance to courts seeking the meaning of "may be substantially to lessen competition."⁴³ Judicial construction of equivalent language in section 3 of the act is also of little value. The substantiality of lessened competition in tying clauses or requirements contracts under section 3 has been determined primarily by the extent to which competitors may be foreclosed from the relevant market—an analysis of perhaps dubious relevance in cases of horizontal merger, where there is no foreclosure.⁴⁴ Accordingly, some reliable criteria must presently be devised to measure the competitive significance of horizontal mergers.

Seeking to establish an adequate basis for prediction to facilitate section 7 enforcement, and provide clear guides to businessmen for evaluating the legality of a contemplated merger, commentators have proposed a test embodying aspects of a "quantitative substantiality" rule originally associated with section 3.⁴⁵ Under a section 7 quantitative test, the market shares of the merging corporations would command principal emphasis, and a prima facie violation would exist whenever these combined reveal too high a percentage of market

41. Seemingly too narrow market definition had the opposite result in *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953). The local community in which each acquired commercial bank was located was deemed a separate market. Since the acquired banks were thus viewed as noncompetitive, the Federal Reserve Board's finding that the challenged acquisitions were leading "toward a monopoly in banking" in a five-state area was rejected. *Id.* at 169. But enhanced control of commercial bank credit would not seem limited to local communities, and such narrow market definition is questionable.

42. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 595 (1957).

43. See cases cited notes 9, 10, 13 *supra*.

44. See, *e.g.*, *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (the *Standard Stations* case); *International Salt Co. v. United States*, 332 U.S. 392 (1947); Comment, 58 COLUM. L. REV. 1269, 1281 n.77 (1958); Levi, *The du Pont Case and Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 3, 7 (1958); *cf.* *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). The Federal Trade Commission has distinguished § 3 as follows: "While both sections are designed to protect the competitive process, they reach this goal by different routes—one by protecting the seller and buyer segment of our economy, the other by protecting competition on an over-all basis." *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 563 (1953). On tests of illegality of tying clauses under § 3, see Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1959).

45. See Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil Co. of California v. United States on the Standard of Legality Under the Clayton Act*, 98 U. PA. L. REV. 10 (1949); Levi, *supra* note 44, at 7. But see Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record*, 7 MERCER L. REV. 279 (1956).

control.⁴⁶ Other factors would be pertinent only when percentages fall short of a predetermined minimum.⁴⁷ Advocates of a "qualitative" test, on the other hand, would consider such elements as ease of entry of new firms into the market, the general increase in industry concentration, the history of the industry's merger activity, economies of scale, and the degree of price and quality competition, in addition to market structure, in all merger cases.⁴⁸

While the Federal Trade Commission in *Pillsbury Mills, Inc.*⁴⁹ viewed quantitative analysis as a refutation of its own expertise, and asserted the need for complete economic analysis in order to determine a merger's competitive effects,⁵⁰ later cases have turned primarily on considerations of market share.⁵¹ Similarly, the courts have underscored the relevance of market

46. See Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955); Bowman, *Towards Less Monopoly*, 101 U. PA. L. REV. 577 (1953), Note, 44 GEO. L.J. 478 (1956) (illustrating several varieties of quantitative tests).

47. See Stigler, *supra* note 46, at 182. His proposed standards are:

1. There should be a presumption that every firm with less than five to ten per cent of an industry's output (after merger) may engage in the merger. Within this range, the percentage should be lower, the larger the industry.
2. Every merger by a firm which possesses one-fifth or more of an industry's output after the merger shall be presumed to violate the statute.
3. In situations that lie between these limits, the merger should be investigated by the enforcement agencies if the aggregate annual sales of the merging firms will exceed some absolute level—say five million dollars—after merger. Its legality should be judged along the lines discussed above.

Ibid.

48. See *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 574-75 (1953) (concurring opinion); HANDLER, *ANTITRUST IN PERSPECTIVE* 69-70 (1957); ATT'Y GEN. REP. 125-27; Barnes, *Competitive Mores And Legal Tests*, 46 GEO. L.J. 577, 620, 629 (1958); Barnes, *Markets, Competition, and Monopolistic Tendencies in Merger Cases*, 40 MARQ. L. REV. 41 (1956). But courts seem increasingly aware that the crux of the quantitative-qualitative dispute actually is the *weight* properly attributable to market shares, not the general relevance of other factors in differing market contexts. See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 n.51 (S.D.N.Y. 1958), where the court characterized the dispute as a "battle of words."

49. 50 F.T.C. 555 (1953).

50. *Id.* at 565. This disposition of the case received frank criticism. See BURNS, A STUDY OF THE ANTITRUST LAWS 325-27 (1958). Recently, the Commission reached the merits of the case and ordered divestiture of the acquired assets. *Pillsbury Co.*, 3 TRADE REG. REP. ¶ 27845 (FTC March 11, 1959).

51. See *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923 (1957) (barring merger of large paper producer with 51.5% of the relevant market and competitor with an 11% market share); *Farm Journal, Inc.*, TRADE REG. REP. (1956-1957 FTC Cas.) ¶ 26023 (1956); *Erie Sand & Gravel Co.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27644 (Nov. 26, 1958) (lake sand producer with 37% of market ordered to divest itself of the assets of a competitor with 55%; initial order).

Consent decrees have been ordered in several cases. See *Scovill Mfg. Corp.*, TRADE REG. REP. (1956-1957 FTC Cas.) ¶ 26206 (1956); *International Paper Co.*, TRADE REG. REP. (1956-1957 FTC Cas.) ¶ 26258 (1956); *Vendo Co.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26724 (1957).

structure.⁵² This emphasis assumes a determinable relationship between market structure and competition. For antitrust purposes, competition may be measured by the degree to which persons selling in the same geographic and product markets attempt through rivalry to preserve and increase their profits by maintaining and augmenting their market share.⁵³ Attempts to develop and offer goods and services of superior quality are one type of competitive activity; another is the offering of more attractive prices.⁵⁴ Experimentation and innovation in order to reduce costs preliminary to lower prices or a higher profit margin are additional reflections of competition. Conversely, events which produce a slackening of innovation, a stabilization of price—in general, which cause a reduction in efforts to increase market share at the expense of competitors—tend to lessen competition.

The Theory

That market structure may affect the level of competitive activity has been demonstrated by theoretical and empirical studies.⁵⁵ Competition is likely to

52. See *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799 (D.D.C. 1958), *appeal docketed*, 27 U.S.L. WEEK 3340 (U.S. May 22, 1959) (1958 Term, No. 942) (agency making 86% of all milk sales to dealers in Washington, D.C., metropolitan area prohibited under § 7 from acquiring dairy with 9.5% of such sales); *E. L. Bruce Co. v. Empire Millwork Corp.*, 164 F. Supp. 446 (S.D.N.Y. 1958) (merger resulting in unit controlling 12% of the hardwood flooring sales in the United States approved since there were 170 competing producers); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953) (nation's 4th largest watch manufacturer with 11% of dollar volume sales granted an injunction against further acquisition of its stock by the 5th leading producer with 9.5% of sales).

Consent decrees have been ordered in several cases. See *United States v. Minute Maid Corp.*, 1955 Trade Cas. 70673 (S.D. Fla. 1955) (divesting some acquisitions and prohibiting any in the future without court approval); *United States v. Hilton Hotels Corp.*, 1956 Trade Cas. 71171 (N.D. Ill. 1956) (divesting two hotel chains of one hotel in each of three cities and barring future acquisitions in those cities for five years); *United States v. General Shoe Corp.*, 1956 Trade Cas. 71227 (M.D. Tenn. 1956); *United States v. Lucky Lager Brewing Co.*, 1958 Trade Cas. 74538 (D. Utah 1958); cf. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 328 (1957).

53. See generally Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); ATT'Y GEN. REP. 318-19; CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (7th ed. 1956); ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* (1934); Stocking, *On the Concept of Workable Competition as an Antitrust Guide*, 2 ANTITRUST BULL. 3, 4 (1956); Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34 (1937); Brems, *Cartels and Competition*, 66 WELTWIRTSCHAFTLICHES ARCHIV. 54 (1951), cited in MACHLUP 435.

54. See ATT'Y GEN. REP. 320.

55. See BURNS, *THE DEFINITION OF COMPETITION* 229 (1936); CHAMBERLIN, *op. cit. supra* note 53, ch. 3; U.S. FTC, *THE MERGER MOVEMENT: A SUMMARY REPORT* 68 (1948); NICHOLLS, *PRICE POLICIES IN THE CIGARETTE INDUSTRY* (1951); WESTON, *THE ROLE OF MERGERS IN THE GROWTH OF LARGE FIRMS* (1953); WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* (TNEC Monograph No. 21, 1941).

Emphasis on the market share of a corporation in determining whether its existence violates the antitrust laws, as in cases under Sherman Act § 2, rather than on exercise

be greatest when there are many sellers, none of which has any significant market share.⁵⁶ Here, when individual firms strive to increase market shares, their competitive moves affect the shares of the others only slightly. Rivals will see little need to respond by equivalent action, and firms need not anticipate that their selling efforts will be nullified by industrywide imitation. Hence, competitive activities in an unconcentrated market will not be impeded by fears of duplication or retaliation.

But, in overly concentrated markets, which section 7 was designed to prevent, any attempt by one seller to increase its market share threatens significantly to decrease the shares of every other.⁵⁷ In order to preserve their market positions, these competitors will find it imperative to match any competitive move. The oligopolist, faced with the probability of parallel action by rival sellers, may recognize that his best course lies in abstention from competition.⁵⁸ For if one seller's efforts are adopted by all, everyone's profit is

of the power conferred by that share, represents a preference for the "structure" theory, which grew prominent in a monopoly context.

Under the structure theory behavior is irrelevant: the law proscribes monopoly itself and not merely monopolization; it reaches the fact of market power rather than the manner of its exercise. The term "structure" is derived from the fact that the theory involves analysis of the composition of a market for a specific product in a given geographic area, including computation of the number of sellers and the like. In short, the test involves finding the defendant's "share of the market."

HALE & HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* 89 (1958); see Mason, *Market Power and Business Conduct*, 46 AM. ECON. REV. 471 (Supp. 1956) (dividing line in determining merger legality must turn on conceptions of market power); Stigler, *The Case Against Big Business*, *Fortune Magazine*, May 1952, pp. 123, 167 (the problem is market control, and until it is decided how much is permissible, the situation will remain confused).

56. See MACHLUP 334-36 (listing six major benefits of many-seller competition); BAIN, *BARRIERS TO NEW COMPETITION* 27 (1956). But see Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241, 256 (1940) (oligopoly with quality differentials results in some of the healthiest cases of workable competition in large-scale industry). See also Robinson, *The Impossibility of Competition*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 245 (Chamberlin ed. 1954); ATT'Y GEN. REP. 325.

57. See *id.* at 326. See generally FELLNER, *COMPETITION AMONG THE FEW* (1949) [hereinafter cited as FELLNER]. For purposes of this Comment, markets composed of a few large sellers plus an indeterminate number of small firms will also be classified as oligopolies, as well as those composed only of a few sellers. While studies of "partial oligopoly" structure are few in number, and largely speculative in conclusions, they tend to indicate that small firms exist by sufferance. And entry of new firms may be possible, though only on a small scale. Within restricted areas, then, the smaller firms may be able to compete, and grow, as long as they do not appear substantially to encroach on the market shares of the larger. See Bain, *Conditions of Entry and the Emergence of Monopoly*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 215, 221 (Chamberlin ed. 1954); FELLNER 136-41; MACHLUP 496 ("partial oligopoly" may evidence price leadership in the same manner as pure oligopoly).

58. See BAIN, *BARRIERS TO NEW COMPETITION* 27 (1956); FELLNER 33; MACHLUP 445 (characterizing the thoughts of an oligopolist: "We all pull our punches, if we punch at all."). But see KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM* 102-03 (1954) (oligopoly is not incompatible with active price competition).

lowered, while no one's market share is increased. For example, an oligopolist may fear that a unilateral price reduction will be met with retaliatory price cuts and open price warfare.⁵⁹

But oligopolists will abstain from competitive pricing only if each is aware that all others view the avoidance of price-cutting as a method of profit maximization.⁶⁰ Price competition will generally occur in the "best" of oligopolies since the imperfection of a seller's knowledge of his rival's intent may lead to "protective" price reductions, even though others may not have attempted inroads on his market share.⁶¹ Nevertheless, the very fewness of participants makes it easier for one oligopolist reasonably to know what others will do. And the few sellers may be able, by implied agreement or consciously parallel action, to ensure uniform price movements—an "administered price" system.⁶² Such a system is paced by an industry "leader," leading in that, with the consent of his fellow sellers, he may alter his price confident that the group will follow suit.⁶³ The leader is likely to be the largest seller within the oligopoly, although more refined techniques may yield rotating leadership so as to avoid glaringly collusive behavior.⁶⁴ Leadership permits an otherwise static industry to increase prices; in its absence, no seller could be sure that a unilateral increase in price would be duplicated by other sellers. He would therefore refrain from such independent action, since it might decrease his market share to the benefit of his rivals. Oligopoly structure thus enables sellers collectively to impose higher prices, with resulting injury to buyers. Some would also argue that oligopoly-fostered "administered prices" increase inflationary tendencies in the economy as a whole.⁶⁵

59. See BREMS, *PRODUCT EQUILIBRIUM UNDER MONOPOLISTIC COMPETITION* 203-04 (Harvard Studies in Monopoly and Competition No. 5, 1951); CHAMBERLIN, *op. cit. supra* note 53, at 51-53 (discussing causes of uncertainty of competitors as to the responses his competitive moves will evoke); Robinson, *supra* note 56, at 246 (citing the enormous cost of oligopolistic warfare); Schneider, *Real Economies of Integration and Large-Scale Production versus Advantages of Domination*, in *MONOPOLY AND COMPETITION AND THEIR REGULATION* 208 (Chamberlin ed. 1954) (oligopoly wars can prove fatal even to large firms).

60. See BREMS, *op. cit. supra* note 59, at 232; MACHLUP 437-38; HALE & HALE, *op. cit. supra* note 55, at 131; FELLNER 33.

61. See FELLNER 178-79. Moreover, periodic "testing" of a seller's market strength may occur, either after a merger or series thereof, or incidental to implementation of a cost-saving device. And psychological factors may make for competition where none was sought. See also Morgenstern, *Oligopoly, Monopolistic Competition, and the Theory of Games*, 38 AM. ECON. REV. 10, 14-15 (Supp. 1948).

62. Fellner, *Collusion and Its Limits Under Oligopoly*, 40 AM. ECON. REV. 54 (Supp. 1950); Robinson, *Imperfect Competition Revisited*, 63 ECONOMIC J. 579, 588 (1953); cf. Morgenstern, *supra* note 61, at 14-15.

63. See FELLNER 120-36 (leadership often implies collusion); MACHLUP 493; CHAMBERLIN, *op. cit. supra* note 53, at 46-51.

64. See MACHLUP 491-95, 500-01.

65. See Lerner, *Halting the Current Recession*, 25 COMMENTARY 110 (1958); Means, *The New-Style "Administrative" Inflation*, New Republic, May 4, 1959, p. 9; Dale, *De-*

A further condition of a completely noncompetitive oligopoly is the ability of sellers to avoid tampering with each other's market shares.⁶⁶ When customers are individual accounts, associated with particular firms through a course of dealing, maintenance of market share is facilitated by tacit understanding that the various sellers shall not try to woo other companies' customers. This practice of live-and-let-live is feasible, in the absence of formal agreement or understanding, only in a market of few sellers. Of course, in the case of consumer goods advertised and sold to unidentified members of the general public, the practice is, absent market division, not possible even in an oligopolistic market.⁶⁷

Wide agreement exists on oligopoly's undesirable impact on price competition.⁶⁸ But such a market structure may also adversely affect innovation and quality competition. In a wide segment of the economy, however, encompassing standardized products such as raw materials, commodities and many semi-finished goods, buyers either do not desire innovation or are unable to recognize quality differences, and quality competition is not to be expected regardless of market structure.⁶⁹ And in the case of most nonstandardized products, shifting buyer tastes, fear that close substitute products will be introduced, and rapid technological change drive even oligopolists to innovation of product and process.⁷⁰ Moreover, the time lag before rivals are able to duplicate quality changes—in contrast to the immediate response evoked by price changes—may allow oligopolists to capture a greater percentage of the market through product innovation.⁷¹

On the other hand, in the area of products which are neither wholly standardized nor threatened by substitutes, and in which only easily duplicated quality changes are feasible, oligopolists may abstain from quality competition for the same reason they do not independently vary price—unwillingness to undertake costly innovation which may not add to market share.⁷² In addi-

bate on "Administered Prices," New York Times, March 22, 1959, § 4, p. 7, col. 3; cf. NEAL, INDUSTRIAL CONCENTRATION AND PRICE INFLEXIBILITY 166 (1942) (concentration tends to accentuate depressions); Galbraith, *Market Structure and Stabilization Policy*, 39 REV. ECONOMICS & STATISTICS 124 (1957) (a concentrated market structure diminishes effectiveness of government monetary and fiscal policy in controlling inflation); *Administered Prices Reconsidered*, 49 AM. ECON. REV. 419 (Supp. 1959).

For the various views on this issue see the testimony of economists in the recent Senate hearings on administered prices. *Hearings Pursuant to S. Res. 231 and S. Res. 57 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pts. 9 & 10 (1959).

66. See MACHLUP 363.

67. See Fellner, *supra* note 62, at 55-56.

68. See authorities cited notes 57-67 *supra*.

69. See Scitovsky, *Ignorance as a Source of Oligopoly Power*, 40 AM. ECON. REV. 48, 50 (Supp. 1950).

70. See notes 140-41 *infra*.

71. See CHAMBERLIN, *op. cit. supra* note 53, at 52; Bain, *supra* note 57, at 229; cf. MACHLUP 457.

72. *Id.* at 460.

tion, oligopoly structure may facilitate suppression of product improvements⁷³ which, because of greater durability, might reduce the volume of industry sales. It has been argued, however, that oligopoly facilitates product and process improvements.⁷⁴ Nevertheless, no empirical evidence exists to show that innovation has been either more or less prevalent in industries bearing traits of oligopoly.

Whether fewness of sellers will cause noncompetitive behavior is also partially dependent on the ease with which new firms may enter the market.⁷⁵ The possibility of successful entry keeps existing sellers' prices down since potential competitors might well capture demand if they could readily undersell established firms.⁷⁶ Sluggishness in quality improvements and innovations may similarly be prevented by easy entry.⁷⁷ Arguably, even in concentrated industries, a level of competition comparable to that expected in a market of many sellers may be thus attained, if sufficient ease of entry exists. Ease of entry is a function of ease of attaining such factors as distribution systems, sources of supply, necessary capital, good will, technological skills, and patents.⁷⁸ And good evidence that entry is easy—a difficult proposition to establish in the abstract—exists in a record of actual successful entry in the past. Consequently, a showing that entry is easy may weaken an inference that a merger which increases concentration substantially lessens competition.⁷⁹

It must be remembered, however, that a particular merger may restrict previously easy entry; when the resulting entity achieves greatly increased market power, the chances of a new firm's success may be jeopardized. At any rate, the possibility of new entrants is but one stimulus to competition. Another is the activity in which each existing firm engages, or is capable of engaging. When both of these stimuli are present, competition may be greater than when only one is present. Accordingly, elimination of a competitor may substantially lessen competition even though ease of entry is still present.

Ease of entry may, however, suggest that new firms will "replace" the competitor lost by the merger.⁸⁰ These new entrants may well introduce vigorous

73. *Id.* at 458; see note 144 *infra*.

74. See notes 140-41 *infra* and accompanying text.

75. See Bain, *Workable Competition in Oligopoly*, 40 AM. ECON. REV. 35, 42 (Supp. 1950). But see Robinson, *supra* note 62, at 579. Free entry to the market has been defined as a condition in which long-run costs of new entrants would be equal to those of firms already in the industry. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 27 (Supp. 1950). Entry conditions have been minimized by economists, however, who have concluded that, theoretically, restricted entry may be quite compatible with perfect competition. See Robinson, *What Is Perfect Competition?*, 49 Q.J. ECON. 104-11 (1934); CHAMBERLIN, *op. cit. supra* note 53, at 200.

76. See Bain, *A Note on Pricing in Monopoly and Oligopoly*, 39 AM. ECON. REV. 448, 452 (1949).

77. Cf. Bain, *supra* note 57, at 226.

78. For a compilation of circumstances creating barriers to entry, see *id.* at 226-27.

79. See Bain, *supra* note 75, at 36 (fairly satisfactory competitive results may emerge due to a long-run threat of entry).

80. The replacement theory has been offered by litigants in several cases. See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 606 (S.D.N.Y. 1958); *Crown*

competition to the market. For while present firms may have something to gain from preservation of the status quo, new firms can survive only by winning customers away from current suppliers or finding outlets undiscovered by older rivals. And this must be accomplished by those activities which characterize competition.⁸¹ On the other hand, it is possible that the merger may cause or increase the industry's oligopolization, and that new entrants will find it necessary, in order to survive, to adhere to the new pattern. Additionally, new entry may not provide a competitive stimulus equal to that of the absorbed unit when the acquired firm was an important competitive force in the market. For new entrants may be capable only of achieving a small share of the market successfully.⁸² For example, a new firm's lack of established good will may render it an unsuccessful competitor.⁸³ Finally, if the absorbed unit was of considerable competitive significance, the likelihood of its "replacement" may be too conjectural to refute a finding of illegality established on other grounds.

Viewing new entrants as replacements for section 7 purposes is acceptance of a theory that the statute will be violated only when competition after the merger may be substantially less than competition before the merger—a "before-after" test. Another interpretation would find a violation whenever postmerger competition may be less than what probably would have existed but for the merger—a "but for" test. Under the latter theory, defendants in section 7 actions could not use the replacement factor to offset the competition lost as a result of the merger. Usually, both tests will produce the same result, since courts would probably presume that the level of premerger competition would have remained constant but for the merger. But when defendants show not only that conditions of easy entry deny the probability of lost competition, but also that such easy entry will produce, or actually has produced, a unit replacing whatever competition may have been eliminated by the suspect merger, utilization of the before-after test would produce no violation. The presence of a new entrant, which substitutes its competitive force for that eliminated by the merger, bars any finding that competition before the merger was greater than that at time of suit. Under a but-for test, however, such a showing would not exonerate the defendant. The replacement unit would have presumably entered the market irrespective of the merger, and, it could be assumed, would have raised the level of market competition had there been no

Zellerbach Corp., TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36460 (1957); *cf.* American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 400 (S.D. N.Y. 1957); Pillsbury Co., 3 TRADE REG. REP. ¶ 27845 (FTC March 11, 1959).

81. See text at notes 53-54 *supra*.

82. See BAIN, BARRIERS TO NEW COMPETITION 12 (1956) (listing existing firms' possible advantages over potential entrants). Bain further points to the possibility that easy entry may remedy an oligopolistic structure only temporarily. New entrants would initially ease concentration, but in time, sellers' combinations would re-aggravate market structure and return it to oligopoly. *Id.* at 34.

83. See American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946).

merger. Thus, illegality could be found if there is a substantial difference between the degree of competition that would have existed had there been entry of a replacement unit and no merger, and the degree of competition at time of suit. Nevertheless, the speculative nature of replacement minimizes the significance of the theoretical distinction between the two tests. Entry on a scale equal to that of the absorbed firm is conjectural, and could be proved only long after the merger, when the actual replacement could be identified.

Since concentration influences the degree of competitive activity likely or possible in a market, competition will be affected by changes in concentration produced by a merger.⁸⁴ Before illegality obtains, however, it must be shown not only that competition may be lessened, but that the threatened lessening is "substantial." If "substantiality" is defined solely in terms of the amount of *change* in competitive activity likely to be wrought by a merger, an unhappy situation results. For, while a merger likely to change a vigorously competitive market into one only moderately competitive would properly be held illegal, an acquisition which took a seriously uncompetitive market and made it slightly less competitive would be legal, though the end result of the latter would be less desirable than that of the former. The failure of theories of section 7 illegality to encompass the instance where already undue concentration is slightly increased is unfortunate, illogical, and inconsistent with the congressional aim.⁸⁵ In order to effect that aim—"to limit future increases in the level of concentration"⁸⁶—a merger which even slightly increases *already undue concentration* should be barred. Accordingly, substantiality would in some cases be determined by the extent of the expected change in competitive activity, and in others by the competitive situation after the merger.

The theoretical proposition that increased concentration may lessen competition does not mean that a particular merger has that effect. In a market composed of a great many small firms, a merger may occur without any significant alteration of the competitive scene. After the merger, the remaining firms will be substantially in the same situation as before; the factors that previously spurred competition will not be appreciably changed. At the other end of the spectrum, if three or four firms dominate an industry in which a greater dispersion of power is both feasible and desirable, no merger of these units should be permitted. Between these poles lies a great range of troublesome intermediates.

The Cases

In *American Crystal Sugar Co. v. Cuban-American Sugar Co.*,⁸⁷ a merger of two highly competitive sugar producers was barred. Defendant, a cane sugar producer with 8.8 per cent of the relevant ten state market, had acquired

84. See Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23 (Supp. 1950); Bowman, *Towards Less Monopoly*, 101 U. PA. L. REV. 577 (1953).

85. See text following note 132 *infra*.

86. See note 21 *supra*.

87. 259 F.2d 524 (2d Cir. 1958), *affirming* 152 F. Supp. 387 (S.D.N.Y. 1957).

stock in plaintiff, a beet sugar producer with a five per cent share of that market. Beet and cane actively competed, and were deemed to constitute a single market.⁸⁸ Plaintiff sought to enjoin the voting and further purchase of its stock by defendant, who was attempting to secure control of both corporations. The district court saw as its duty to consider "all the competitive factors" in determining whether competition might be substantially lessened.⁸⁹ After investigating industry structure, conduct, and performance, the court held that common control would violate section 7, and enjoined voting and further stock acquisition by Cuban-American.⁹⁰

The district court first noted the market shares of plaintiff and defendant, apparently to indicate that their influence on market activity was significant.⁹¹ The remainder of the opinion emphasized the individual behavior of the firms, both as they competed with each other, and as this activity influenced total market competition. It portrayed them as "major competitive factors,"⁹² and "of economic significance,"⁹³ presenting in detail the arenas within which they vigorously competed.⁹⁴ The court spoke of the general competitive impact of the rivalry between plaintiff and defendant; it noted that a "significant contribution to competitive conduct is made by . . . [their] independent decisions."⁹⁵ Combined, they would make less of a contribution to competition than they now make separately, and accordingly, a merger would tend substantially to lessen competition. Since entry was extremely difficult, replacement of the lost competition seemed highly unlikely.⁹⁶

While the test of section 7 illegality is not the amount of lost competition between the merging units, such competition was properly given weight in determining the effect of the contemplated merger on the market.⁹⁷ Competition does not occur in a vacuum, but affects other sellers, who must keep pace with the competitive activities of the acquiring and acquired firms in order to survive. Since these firms would no longer spur each other to com-

88. 259 F.2d at 529.

89. 152 F. Supp. at 395.

90. The lower court found divestiture of stock already acquired unnecessary. 152 F. Supp. at 400-01.

91. *Id.* at 390-91.

92. *Id.* at 391.

93. *Id.* at 399.

94. *Id.* at 390-91. See discussion on market definition at notes 22-42 *supra* and accompanying text.

95. 152 F. Supp. at 399. The companies involved were subject to the restrictions of the Sugar Act of 1948, 61 Stat. 922, as amended, 70 Stat. 217 (1956), 7 U.S.C. §§ 1100-61 (Supp. V, 1958). This legislation, however, while imposing annual production and marketing quotas on producers, does not seriously curtail legitimate competitive efforts to attract new purchasers—rivalry may still thrive between firms as to "who gets the business."

96. See text discussion following note 82 *supra*.

97. See 259 F.2d at 527, where the circuit court rejected a test of illegality based on the acquisition's impact on competition between the corporations involved. Such a test was abandoned in the 1950 amendment. See note 21 *supra*.

petitive activity, a likelihood existed that common control would engender less competition than did independent ownership. In certain situations, however, other firms in an industry might compete so actively that the combined unit would have no choice but to do the same. In *American Crystal Sugar*, though, the independence of decision of plaintiff and defendant was found to be a prime factor in stimulating total market competition. The continued separation of the two firms was correspondingly sound.⁹⁸

American Crystal Sugar did not use structure analysis to strike down the merger by demonstrating that it produced undue concentration. Rather, structure was discussed for the purpose of imputing significance to the competitive activity of the two firms. Since the firms involved were highly competitive major market factors, the merger was likely to diminish competition in the industry significantly, and therefore was illegal. As a disposition of the case at hand, this approach is satisfactory. But it fails to indicate the proper ruling had the two firms not been vigorous competitors. In fact, it seems clear that, given the structural importance of the two firms in a market in which two-thirds of all sugar sold was supplied by seven firms, and in which entry was difficult,⁹⁹ the merger should have been barred even if they were not engaged in active rivalry. That illegality would follow in such a case now seems established, not by *American Crystal Sugar*, but by *United States v. Bethlehem Steel Corp.*¹⁰⁰

Bethlehem involved the proposed merger of the nation's second largest steel producer (Bethlehem), with 15.4 per cent of the industry's ingot capacity, and the fifth largest (Youngstown), with 4.7 per cent of this capacity.¹⁰¹ The consolidated firm would have been, in terms of dollar value of facilities, the largest industrial combination in the nation's history.¹⁰² Steel is a highly concentrated industry; twelve integrated firms control eighty-three per cent of the nation's capacity.¹⁰³ Member firms had a history of growth through ex-

98. The court also spoke generally of industry concentration. 152 F. Supp. at 397. It recognized that § 7 was in part designed to deter substantial increases in market concentration, and felt that an increase in national concentration would be undesirable. *Id.* at 400. Such a discussion of national market structure is puzzling in an analysis of competition in the local ten state market area. Discussion of concentration in the relevant market would better assist prediction as to the future competitive activity in that market. Yet, the only mention of the ten-state market structure was the articulation of the merging firms' market shares, and the fact that they would form the second largest seller in that market when combined. See notes 22-42 *supra* and accompanying text. See 259 F.2d at 529 for the additional information on concentration in the ten-state market provided by the circuit court, not contained in the lower court's opinion: "one-third of its [the relevant market] supply is scattered among others than the seven firms . . . in which two-thirds of the supply is concentrated."

99. 259 F.2d at 529-31.

100. 168 F. Supp. 576 (S.D.N.Y. 1958). The defendants declined to appeal the adverse decision. N.Y. Times, Jan. 28, 1959, p. 39, col. 1.

101. 168 F. Supp. at 585. The percentages represent 1957 capacity.

102. *Bethlehem-Youngstown: Controversial Engagement*, Fortune, June 1957, p. 145.

103. 168 F. Supp. at 585.

ternal acquisition, and the industry displayed an absence of real price competition.¹⁰⁴ The Government charged that the merger would substantially lessen competition in the national iron and steel market, and in various regional markets for several specified products. The court, after reviewing the legislative history of the amended section 7, emphasized the objective of limiting future increases in the level of economic concentration resulting from corporate mergers and acquisitions.¹⁰⁵ It eschewed the qualitative-quantitative dispute in determining the illegality of a merger.¹⁰⁶ Instead, in the light of its view of the purposes of the act, the court announced two standards of illegality: section 7 is violated when concentration is substantially increased, or when a substantial competitive factor in a market is eliminated.¹⁰⁷

Though the court failed to make explicit the basis for its conclusion that Youngstown was a substantial factor, market share, both nationally and regionally, appeared controlling. In concluding that concentration would be substantially increased by the merger, market structure was similarly emphasized.¹⁰⁸ The merger would have increased Bethlehem's market share from approximately sixteen per cent to twenty-one per cent. The industry was already highly concentrated; the court spoke first of a Big Four and then of a Big Two. The twelve integrated producers were a "severely limited group," uniformly adhering to the price leadership of U.S. Steel.¹⁰⁹ In this oligopolistic industry, absorption of five per cent would, to the court, have substantially

104. *Id.* at 587, 606. The court recognized freight absorption as one type of competition in the steel industry, but viewed this as inadequate to support claims of proper competition. For expositions of freight absorption, see Stigler, *A Theory of Delivered Price Systems*, 39 AM. ECON. REV. 1143 (1949); Bowman, Book Review, 17 U. CHI. L. REV. 218 (1949).

105. 168 F. Supp. at 582-83. Also emphasized were preservation of small business as an important factor in the American economy, prevention of incipient monopolistic tendencies, and avoidance of a Sherman Act test in deciding the effects of a merger.

106. *Id.* at 603 n.51.

107. The court listed two additional tests: where a substantial source of supply is eliminated, or where the merger results in the establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete. *Id.* at 603. Apparently, these tests were designed to deal with problems of vertical concentration.

108. See *id.* at 585, 586, 604, 605, 607. The acquiring unit was designated a "colossus" and the unit to be absorbed a "giant." *Id.* at 604. The court emphasized the absolute size of the merging units, not solely as it reflected the industrial strength of Bethlehem and Youngstown, but also to illustrate the national significance of the corporations. Thus, the merger, it is implied, would have an indirect but significant effect on the economy as a whole. While this may well be true, it does not necessarily follow that the greater the absolute size, the more likely it will be that a merger will prove adverse to competition. Admittedly, when absolute size of the firms is high, the merger is likely to be illegal—but for the reason that generally the industry will be found to be unduly concentrated. Great absolute size may also indicate that new entry will be less likely to mitigate the enhanced concentration. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 n.12 (1955).

109. 168 F. Supp. at 607.

increased concentration.¹¹⁰ Since replacement by a new entrant, in view of the "frozen-entry" status of the industry, was most unlikely, this reduction in the number of competitors would be permanent. Nor was it probable, considering Bethlehem's past history, that the resulting firm's market share would suffer any subsequent diminution.¹¹¹ Additionally, the court found the merger would make even more difficult real competition by the small firms, who presently follow U.S. Steel.¹¹²

If the substantiality of a competitor is to be determined, as in *Bethlehem*, on the basis of market structure alone, the two standards enunciated in that case seem indistinguishable. For when the factor eliminated is substantial, the increase in concentration would also be substantial. Concomitantly, an increase in concentration could not be substantial unless the absorbed unit has a significant market share. On the authority of *American Crystal Sugar*, however, substantiality of a competitor would also be found to exist on the basis of the vitality with which it competes, even though its size alone is not significant.¹¹³ In such a case, there would not be a substantial increase in concentration, but the merger would be illegal, because of the elimination of a substantial competitor.

Bethlehem thus teaches that the absorption of a factor of substantial market size warrants a finding of illegality, irrespective of the unit's competitive vigor. By eliminating the firm's capacity for independent decision, and creating a unit more closely aligned with larger oligopolists, merger decreases the unit's likelihood of ever becoming a vigorous competitor.¹¹⁴ Accordingly, a substantial factor cannot justify a merger by indicating that it has refrained from active competition, if indeed it considered such contentions good trial strategy. Moreover, irrespective of considerations of the acquired firm's active contribution to competition, the increase in market concentration would suffice to warrant a finding of illegality.

On the other hand, if premerger market share is not undue, the unit's activity becomes relevant. If a vigorous competitor is absorbed, insubstantiality of increase in concentration would be irrelevant. Since the statute's ulti-

110. *Id.* at 604-07. Since 1905, 26% of Bethlehem's growth was due to acquisition, 58% to enlargement of acquired facilities, and 16% to enlargement of Bethlehem's original facilities. Since 1901, 20% of Youngstown's growth was due to acquisition, 52% to enlargement of acquired facilities, and 28% to enlargement of original facilities. Findings of Fact and Conclusions of Law [hereinafter cited as Findings] Nos. 40, 43, *United States v. Bethlehem Steel Corp.*, Civ. No. 115-328, S.D.N.Y., Nov. 20, 1958. *But see* Stigler, *The Statistics of Monopoly and Merger*, 64 J. POL. ECON. 33, 38 (1956) (percent of growth via merger may be considerably understated when the price level of assets is much lower during the period of most active merger).

111. 168 F. Supp. at 606.

112. *Id.* at 604.

113. See text at notes 7-98 *supra*.

114. Cf. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 604 (S.D.N.Y. 1958); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 399 (S.D.N.Y. 1957).

mate test is lost *competition*, a violation might be found if the absorbed unit were robustly competitive. If, however, the unit was a passive participant in a competitive market, content to follow the trends of the active competitors, the merger might be permitted. For no substantial competition is lost, and the firm is not sufficiently significant for the loss of its potential contribution to be of relevance. To permit a merger with an insignificant and passive competitor, but not with a firm of the same size which is highly competitive, appears to penalize the competitor, if it is not opposed to the merger as American Crystal was. Nevertheless, competition would not be deterred by this since the decision to compete will probably be based on profit potentialities, and will not be affected by the speculative desirability of qualifying under section 7 at some future date.

A more difficult case than either *American Crystal Sugar* or *Bethlehem* confronted the FTC in *Brillo Mfg. Co.*¹¹⁵ Though lacking the precedent value of either of the former cases, the facts of *Brillo* provide a useful context in which to expose problems of section 7 interpretation. Brillo controlled twenty-nine per cent of the market for industrial steel wool, and Williams, the acquired corporation, eighteen per cent. The acquirer was the fourth largest of seven producers in a market which had total annual sales of five million dollars. In the household steel wool market, Brillo, with 45.3 per cent, was the second largest producer. SOS, the only other major producer, controlled fifty per cent. Williams' share of the household market was only 0.3 per cent. The hearing examiner, basing his decision solely on what he considered a correct application of the theory of quantitative substantiality, held that the merger established a *prima facie* case of substantially lessened competition in the industrial market, but not in the consumer market. The Commission reversed and remanded, directing the examiner to consider, in addition to market shares, all factors, including the general competitive situation, number of competitors, and the degree of concentration prevailing in the industry.¹¹⁶ It also required, in viewing the consumer market, consideration of postacquisition production and marketing data. On remand, the examiner found no violation in either market.

With respect to industrial steel wool, the examiner stated on remand that concentration was not undue; though four producers controlled over eighty-five per cent of the market, the small volume of commerce would probably not support more than a total of seven sellers.¹¹⁷ He saw the industrial steel wool market as highly competitive in price, and entry into the market as not difficult. Though cost savings resulting from the merger might permit Brillo to lower its prices to the detriment of less efficient competitors, the examiner

115. TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27243 (1958) (remanding case to examiner); *id.* ¶ 27641 (Nov. 26, 1958) (dismissing complaint).

116. The Commission recognized, however, that "only evidentiary material from which significant market or competitive impact may be evident need be received." TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27243, at 36625 (1958).

117. *Brillo Mfg. Co.*, No. 6557, FTC, Nov. 26, 1958, at 6.

distinguished between competition and competitors, and rejected an interpretation of the antitrust laws which would "insulate weak competitors from the rigours of hard, fair competition."¹¹⁸

The examiner's statement of the propriety of premerger, and presumably postmerger, market concentration fails to provide an adequate basis for predicting the merger's probable effects on future competition. Initially, he found that Brillo was no more an industry leader than "any major factor in any highly competitive market."¹¹⁹ But existence of premerger price competition must be carefully weighed when such a significant alteration in market structure has occurred. Where structure is not markedly altered, evidence of premerger competition may serve as a basis for predicting the nature of postmerger competition. For it is reasonable to assume that when one small unit of no special competitive significance is lost, factors which previously spurred competitive activity will continue to do so. But the more marked the structural change caused by the merger, the less is the weight properly attributable to premerger competitive activity. Since Brillo now controls almost half the market, in contrast to its former share of slightly over one-quarter, the probability of leadership or other misuse of market strength subsequent to the merger—despite premerger competition—is considerable.

Apparently to establish lack of concentration and the probable impermanence of any loss of competition resulting from the merger, the examiner investigated market entry and found it not difficult. Specifically, two new entrants had come into the market "in recent years," one subsequent to the merger.¹²⁰ Admittedly, entry is a relevant consideration in determining not only the competitive nature of the premerger market, but also the likelihood of continued competition in the postmerger market.¹²¹ But it is unclear whether the two new firms did enter, or could enter, on a scale approaching that of the absorbed unit.¹²² Possibly, the entrants did not intend to—or could not—expand to the substantial proportions of the former Williams. The entry of one or two units which capture merely two or three per cent of a market for an indefinite period may not support a claim that an eighteen per cent unit will be replaced. Moreover, the one entrant subsequent to the merger does not completely establish ease of entry, for the opinion does not consider whether the continued existence of the newest company is to any degree assured. In addition, the finding that entry to the industry is easy is not in harmony with the examiner's other propositions that the industry would probably not support more than seven sellers, and that Brillo could effect cost savings by increasing its market share.¹²³ According to these propositions, an eighth producer would be at a serious cost disadvantage.

118. *Id.* at 8.

119. *Id.* at 5.

120. *Id.* at 6.

121. See text at note 73 *supra*.

122. See text at note 84 *supra*.

123. No. 6557, FTC, at 6.

Relating the number of producers to the total volume of commerce, the examiner found the market not unduly concentrated. He viewed seven units as a relatively large number.¹²⁴ Underlying his approval of this market structure was a judgment as to the economies of scale appropriate to the industry.¹²⁵ But merely to state that seven producers share five million dollars establishes nothing, for conceivably ten producers, or twenty, could profitably have existed in the market. In fact, some of the preexisting members possessed less than ten per cent of the market, and according to the examiner, were going concerns.¹²⁶ Their ability to survive in the face of vigorous price competition, even though they were relatively small, implies a market susceptible to greater dispersion.¹²⁷ If the small were less efficient than the large, the latter could have underpriced the former and attained increased market shares; if the larger corporations did not so behave, though possessed of greater efficiencies, a noncompetitive situation—one not to be aggravated—would have been evident. If the smaller firms were not in fact successful, the examiner's contention that successful entry is easy is refuted. Furthermore, the fact that economies of scale in the industry may have precluded more than seven producers is irrelevant to the issue of undue concentration; it makes oligopoly parallelism no less easy for such a small number of producers to achieve.

The propriety of concentration is not proved by numbers alone,¹²⁸ but rather may be revealed by the competitive activity in the market; healthy competition suggests that concentration is not undue, and insufficient competition suggests the opposite. Thus, the examiner's finding of price competition among all producers deserves far greater weight than his mere articulation of the ratio of seller number to total dollar volume. More pertinent would have been findings whether innovations, reductions in price, or variations in distribution techniques are initiated by the Big Four. If so, the elimination of one of the Four, markedly increasing concentration, might seriously lessen competition. The opinion, however, stressed the statements of government witnesses that competition after the merger "was just as keen if not keener than before."¹²⁹ Complete reliance cannot be placed on postmerger data. For the possibility of Clayton Act prosecution may restrain the consolidated firm from prematurely exercising its increased power to the probable detriment of competition. Certainly, once a suit is brought, the defendant will studiously avoid any activity which would tend to show that competition has, or may be, lessened as a result of the merger. But immediate forbearance to use the power to lessen competition does not show that the merger has not created the power, nor does it mean that it will not subsequently be exercised.

124. *Ibid.*

125. For a discussion of the difficulties of ascertaining economies of scale, see text at notes 159-64 *infra*.

126. No. 6557, FTC, at 6.

127. For a discussion of survival as the best measure of optimum firm size, see notes 161-62 *infra* and accompanying text.

128. See ATT'Y GEN. REP. 325.

129. No. 6557, FTC, at 6.

Additionally, findings of premerger competition and ease of entry count for little in the presence of substantial alteration of market structure. When a firm attains fifty per cent control of a market, which includes only five other concerns, through the absorption of a presumably vigorous eighteen per cent competitor, those mitigants which might detract from a conclusion of illegality lose importance.

In the duopolistic household market, the examiner's dominant consideration was the absorbed unit's market share.¹³⁰ It was apparently *de minimis*—Williams did a \$75,000 business in a \$25,000,000 market. Under the tests enunciated in *Bethlehem* the examiner was correct in finding no violation; adding 0.3 per cent to Brillo's 45.3 per cent could not be termed a "substantial" increase in concentration, and the absorption of Williams does not eliminate a "substantial" competitive factor. This second conclusion is necessarily true if the examiner's definition of the relevant geographic market as nationwide is accepted.¹³¹ Of course, if Williams garnered its 0.3 per cent of national sales in a "natural selling area" where it controlled perhaps twenty per cent of regional sales, the competitive impact of the merger would be different. But presuming that Williams had a small volume of sales in a great many areas—although this is not apparent in the opinion—its market share was, on its face, too inconsequential to qualify as a "substantial market factor" after the pattern of Youngstown. Nor would Williams qualify as a "substantial market factor" under a vigor-of-competition test borrowed from *American Crystal Sugar*. Its very size indicates that it did not offer any present competition to Brillo or SOS, the other duopolist.

Situations exist, however, when a merger should be prohibited even if the *Bethlehem* standards are not violated. For example, assume that the thirty per cent leader in the steel industry wished to merge with the eleventh largest firm with 1.4 per cent of ingot capacity. Under *Bethlehem*, the increase in concentration would not be substantial; presumably the absorption of 1.4 per cent would not represent the loss of a "substantial factor in competition" in the steel industry. Nevertheless, it is unlikely that Congress, in its concern with market concentration, intended that an acquisition such as hypothesized would be permitted. The leader of the steel industry, it would seem, should not be allowed to increase further, even slightly, its market dominance through merger. This is especially true since, with substantially no new firms entering, erosion of the dominance of the large comes only from the growth of the small. For though the change wrought in industry structure would be minimal, the degree competition would be lessened would be substantial in relation to the already inadequate competitive level before the merger. While such a merger would effect neither a substantial increase in concentration nor the elimina-

130. *Id.* at 10 ("[T]he acquisition can have no effect upon the remaining companies.").

131. See text at notes 22-42 *supra*.

tion of a substantial factor in competition, it does produce an increase in undue concentration; and substantiality of lessened competition presumably encompasses aggravation of an already unfortunate situation.¹³² Much of the same reasoning may apply to the household facet of *Brillo*.

When it aimed "to limit future increases in the level of concentration," Congress apparently intended to prevent duopolists from increasing their market power, no matter how slightly, by merger. It is easy to say that the elimination of the miniscule Williams cannot substantially lessen competition. Yet, it is only the various Williamses, present and potential, who can eventually transform the household steel wool industry's structure into one more amenable to active competition. And even if Williams itself is unable ever to provide any meaningful competition for the duopolists, its continued independence can be an invitation to potential entrants, who may be able to do so. Of course, if increased concentration is deemed to be harmful only when the new structure is likely to cause a modification of the remaining firms' competitive activities, Williams' elimination would probably not alter industry practices, and the merger would be properly upheld.

Summary

Oligopoly is the market structure at which section 7 is aimed. A departure from a rationally competitive economy, oligopoly leads producers to shun competitive behavior—not because of malicious intent, but because maintenance of market share is largely dependent, in a concentrated industry, on adoption of parallel policies. Thus, the detriment to competition flowing from a particular merger may be measured, with relative convenience, by changes in the level of industry concentration wrought by the consolidation. The substantiality of the detriment will turn not only upon the market shares of the acquired and the acquirer, but upon the level of concentration in the entire market. Easy entry may mitigate, although to a limited extent, the effect of increased concentration. Additionally, the competitive vigor of the merging firms can be relevant to substantiality.

Emphasis on market structure, with an eye on the merging firms' record of active competition, would appear to combine the merits of rigid concepts of illegality, based only upon the increase in the market share or dollar sales volume of the acquiring firm ("quantitative substantiality"), and the analysis of all industry factors advocated in *Pillsbury*. Structure analysis eases somewhat the administrative burdens of section 7 litigation—the avowed goal of

132. A result similar to that in this analysis was reached in *Aluminum Co. of America v. FTC*, 284 Fed. 401 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923) (partial acquisition by Alcoa, the nation's leading aluminum fabricator, and sole producer of virgin aluminum ingot—150 million lbs. per year capacity—of an independent fabricator with capacity to produce 3 million lbs. per year of rolled aluminum products, illegal under § 7).

more arbitrary tests—without sacrificing consideration of the crucial factor of overall industry concentration.

THE RELEVANCE OF AFFIRMATIVE BENEFITS

In the course of litigation so far conducted, defendants have claimed that economically and socially desirable mergers are being denied.¹³³ They have suggested a variety of mitigating factors which, they say, should exculpate mergers irrespective of their effect on competition. This section will undertake to discuss the four most prominent of these factors: (1) greater efficiency of production, (2) survival of a failing company, (3) expansion of output, and (4) more vigorous challenge to industry leaders.

Mergers for Efficiency—Problems of Economies of Scale

Many industrial mergers, it has been contended, will permit more efficient production, leading to lower costs and better employment of national resources.¹³⁴ Corporate consolidations are said to "spread overhead,"¹³⁵ utilize managerial talent more fully, and reach levels of efficiency that neither firm could attain alone. While no merger, otherwise illegal, has ever been justified

133. For a comprehensive listing of the business motives for mergers see *Hearings Pursuant to S. Res. 61 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess., pt. 1, at 413-14 (1955) [hereinafter cited as *1955 Hearings*] (statement of J. Fred Weston, Associate Professor of Finance, University of California).

But "behind the publicly stated or 'good' reasons often lurks the 'real' reason." Mead, *Mergers—Good or Bad Medicine*, *Magazine of Wall Street*, April 27, 1957, p. 146. Among the reasons which are not likely to appear in briefs of counsel are: gains from the sale of securities; profits of promoters; desire to eliminate a troublesome competitor or increase market power; control of strategic patents, trade names, or trademarks; control of key raw materials or access to important distributive outlets; realization of tax savings through acquisition of net loss carryovers or high basis assets. *1955 Hearings* 413-14; Harris, *The Urge To Merge*, *Fortune*, Nov. 1954, p. 102; Stedman, *The Merger Statute: Sleeping Giant or Sleeping Beauty?*, 52 NW. U.L. REV. 567, 594-96 (1957); *Red Ink Assets*, *Barron's*, Dec. 8, 1958, p. 9.

The owners of closely-held corporations may desire:

to sell out for cash on a capital-gains basis, to avoid the accumulated-earnings tax, to obviate estate-tax valuation problems and provide cash or liquid assets with which to meet death taxes, or to exchange their closely held stock tax-free for readily marketable stock of a public company.

Hellerstein, *Mergers, Taxes and Realism*, 71 HARV. L. REV. 254, 255 (1957).

Or the manager-owner of a close corporation may merely wish to retire from active managerial functions. See *Western Meat Co. v. FTC*, 1 F.2d 95, 98 (9th Cir. 1924).

134. E.g., Dean, *Business Considerations—Why Merge?*, 3 ANTITRUST BULL. 513 (1958).

135. ATT'Y GEN. REP. 125. But see Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 181 n.10 (1955) (critical of the Committee's "overhead cost" position).

on these grounds,¹³⁶ efficiency arguments have received some judicial and administrative recognition.¹³⁷

The efficiency argument derives support from the widely held view that bigger corporations promote industrial growth. Some commentators contend that relaxation of merger restrictions will enable management to build more diversified and better integrated enterprises which could reach all parts of vast domestic and foreign markets and adapt to market shifts and industrial changes.¹³⁸ They argue that a stronger consolidated entity could achieve lower capital costs,¹³⁹ support expanded technological research and develop-

136. In the case of some regulated industries, increased efficiency realized through merger may be considered along with anticompetitive effects. *E.g.*, *McLean Trucking Co. v. United States*, 321 U.S. 67, 85-87 (1944); *Minneapolis & St. L. Ry. v. United States*, 165 F. Supp. 893, 899 (D. Minn. 1958). See generally Note, 58 COLUM. L. REV. 673 (1958). The issues are different in regulated industries, however. The expertise of the regulatory agency allows more reliable consideration of anticipated efficiencies; the regulated industries are, generally, affected by declining costs, which allow firms to attain economies of scale through consolidation, see authorities cited notes 158, 161 *infra*; and supervision of ratemaking and other aspects of operation by the agency may eliminate the need for competition as a regulator. See generally WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* ch. 17 (1955).

137. Efficiency was discussed in a number of old § 7 cases. *V. Vivaudou, Inc. v. FTC*, 54 F.2d 273, 275 (2d Cir. 1931) ("The effect [of the merger] seems to have been to increase the sales of the products of the . . . [merging] companies."); *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656, 660 (3d Cir. 1931) ("reduction of overhead and operating expenses"); *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 125 (N.D. Ohio 1935) ("reduction in costs of manufacture and distribution"). *Contra*, *Aluminum Co. of America v. FTC*, 284 Fed. 401, 408 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923); see *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 65 F.2d 336, 337 (2d Cir. 1933), *rev'd on other grounds*, 291 U.S. 587 (1934); *Swift & Co. v. FTC*, 8 F.2d 595, 599 (7th Cir. 1925), *rev'd on other grounds*, 272 U.S. 554 (1926). See also Handler, *Industrial Mergers and the Anti-trust Laws*, 32 COLUM. L. REV. 179, 268 n.320 (1932) (collecting state court cases).

The agencies have given some cognizance to the efficiency position. 1955 *Hearings* 298 (statement of Stanley N. Barnes, Assistant Attorney General) (small automobile mergers "might economize by eliminating duplicating facilities"). The giant 1920 mergers in which Bethlehem acquired the second and third largest steel companies were approved by the Attorney General (although the FTC issued complaints) on the basis of alleged economies of scale. *Bethlehem Steel Corp.*, 5 F.T.C. 488 (1923); *Historical Development and Merger Motives of Bethlehem Steel Corporation*, in U.S. TNEC MONOGRAPH No. 13, *RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED AND SMALL BUSINESS* 214, 261 (1941); 1 WHITNEY, *ANTITRUST POLICIES—AMERICAN EXPERIENCE IN TWENTY INDUSTRIES* 265-66 (1958).

Some of the recent cases have implied the relevancy of efficiency contentions. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 531 (2d Cir. 1958) (dictum); *cf. United States v. Brown Shoe Co.*, 1956 Trade Cas. 71109 (E.D. Mo.); *Brillo Mfg. Co.*, No. 6557, FTC, Nov. 26, 1958, at 8 (cost savings resulting from greater efficiency of the merged firm would enhance competition).

138. *E.g.*, Slichter, *A Defense of Bigness in Business*, N.Y. Times, Aug. 4, 1957, § 6 (Magazine), p. 10; LILIENTHAL, *BIG BUSINESS: A NEW ERA* (1953).

139. See BAIN, *BARRIERS TO NEW COMPETITION* 146 (1956); Kaplan, *Influence of Size of Firms on the Functioning of the Economy*, 40 AM. ECON. REV. 74, 76-78 (Supp. 1950); Dean, *supra* note 134, at 519-20; *cf. Note*, 47 CALIF. L. REV. 144-45 (1959).

ment, and better withstand the risks of introducing new products into the market.¹⁴⁰ Technological innovation thus promoted, the argument runs, is a more effective market regulator than a competitive price system.¹⁴¹ It has also been argued that capable executives need new outlets for their creative energies. Therefore, effective employment of top entrepreneurial ability, which is supposedly in short supply, would require that able managers be afforded every opportunity, including merger, to build larger economic structures.¹⁴²

Those who take the contrary view point to evidence that profit margins are higher for medium- and small-size firms.¹⁴³ They assert that no empirical verification exists for claims that larger firms contribute proportionately more to technological advance.¹⁴⁴ Nor is there evidence, they say, that smaller firms are more timorous in putting forth new products. Indeed, they suppose that the small company's less secure competitive status spurs greater effort and risk-taking; the small firm is fighting for survival, not only for profit. Market power, they emphasize, may deaden initiative, and thus inhibit industrial progress.¹⁴⁵ And, while recognizing that increasingly complex production processes

140. *E.g.*, SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* chs. VII & VIII, esp. at 84-85 (2d ed. 1947); GALBRAITH, *AMERICAN CAPITALISM* ch. VII (2d ed. 1956); see MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* ch. 5 (1957); Stigler, *The Economies of Scale*, 1 J.L. & ECONOMICS 54, 66 (1958). One author has concluded from an industry study that "some degree of monopoly is essential to technological progress . . ." Maclaurin, *Technological Progress in Some American Industries*, 44 AM. ECON. REV. 178, 182 (Supp. 1954).

141. Schumpeter, the leading advocate of this position, termed innovation a "perennial gale of creative destruction" which forces rivals into new and better products and processes. SCHUMPETER, *op. cit. supra* note 140, at 84.

142. MASON, *op. cit. supra* note 140, at 97-99.

143. See, *e.g.*, Rostow, *Over-all Size*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 311, 312-13 (Van Cise & Dunn ed. 1954); U.S. TNEC MONOGRAPH No. 13, *RELATIVE EFFICIENCY OF LARGE, MEDIUM-SIZED, AND SMALL BUSINESS* 14 (1941).

144. *E.g.*, MASON, *op. cit. supra* note 140, at 99, 377-78; ADAMS & GRAY, *MONOPOLY IN AMERICA* 15-16 (1955); DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 41 (1959). In addition some argue that large firms suppress innovations which might reduce sales. See Adams, *Technological Progress—Discussion*, 44 AM. ECON. REV. 190, 191 (Supp. 1954) (citing, *inter alia*, the "heroic effort by the General Electric research organization to shorten the life of flashlight batteries").

Recent growth of independent research corporations may enable even the smallest firms to buy research and development in digestible doses and overcome large firm advantages. Stedman, *supra* note 133, at 605. Further, the federal government is now the chief sponsor of technological research, either by direct subsidy or tax policy. Stocking, *Institutional Factors in Economic Thinking*, 49 AM. ECON. REV. 1, 11 (1959). Government could therefore influence the extent of research and development by small firms. Stedman, *supra* note 133, at 605.

145. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 341, 347 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); ADAMS & GRAY, *MONOPOLY IN AMERICA* 177 (1955) ("[T]he rigorous discipline of the free market serves the twofold function of compelling efficiency and preventing exploitation.").

may dictate large plants, they doubt the necessity for cumbersome combinations of geographically and functionally separate facilities.¹⁴⁶

These commentators also stress that acquisition of competitors is but one means of corporate expansion and diversification.¹⁴⁷ If the relatively easy merger route is thrown open, they say, firms are less likely to meet the more important challenge—and equally desirable outlet for restive managerial talent—of building themselves internally.¹⁴⁸ As compared with internal growth, mergers are, of course, a more rapid means of expansion. They obviate much of the risk associated with starting up a new plant or division, and may require less outlay. But the lower cost of external acquisitions may reflect nothing more than the acquirer's bargaining power, or a temporary stock market valuation of assets below their real worth.¹⁴⁹ And mergers may lead to less efficient resource utilization for the economy as a whole. The assets of two firms may not complement each other as effectively as new assets would complement the resources of either of them.¹⁵⁰ Furthermore, internal growth, unlike mergers, necessarily increases total industry capacity. New output resulting from internal growth must actively search new markets or lure customers from competitors, thus increasing the level of competitive activity. In addition, the more rigorous demands of internal growth may be more certain to utilize the talents of only the most capable executives.¹⁵¹

Even if internal growth is impractical, corporations may expand and diversify, and able managements may give full rein to their abilities, by mergers, not violative of section 7, with firms in other markets.¹⁵² In fact, such con-

146. See Bain, *Economics of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries*, 44 AM. ECON. REV. 15, 38-39 (1954); Adams, *The Steel Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY 145, 185-88 (Adams ed. 1954); Douglas, *Introduction to ADAMS & GRAY, MONOPOLY IN AMERICA* at xiv (1955).

147. See Welling & Wirth, *Diversification—With or Without Acquisition*, in AMERICAN MANAGEMENT ASS'N, MERGERS AND ACQUISITIONS 53, 56 (1957) (six ways to diversify).

148. E.g., Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 494 (1957).

149. 1955 Hearings 413; Markham, *supra* note 148, at 494.

150. *Ibid.*; EDWARDS, *BIG BUSINESS AND THE POLICY OF COMPETITION* 123 (1956).

151. MASON, *op. cit. supra* note 140, at 97-99. "[S]lowly acquired internal smoothness of operation" has also been cited as an advantage of internal growth over mergers. 2 DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 866 (5th ed. 1953).

152. MASON, *op. cit. supra* note 140, at 375.

Acquisitions in other markets may also be thwarted if "conglomerate" mergers are successfully brought within the scope of § 7. See Procter & Gamble Co., TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26737 (1957) (complaint filed against acquisition by soap producer of largest seller of household bleaches); H.R. REP. No. 1191, 81st Cong., 1st Sess. 11 (1949) (amended statute intended to apply to conglomerate mergers); Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955); Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 ANTITRUST BULL. 175 (1956); Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672, 683 (1958).

glomerate mergers, providing diversification into new products and geographic areas, may be a better hedge against seasonal fluctuations and technological innovation than horizontal acquisitions.

If increased efficiency gained recognition as a justification for anticompetitive mergers, widespread demand might be provoked for alternative and more heavy-handed means of public control than the relatively laissez faire antitrust laws.¹⁵³ A Congress which is studying regulation of "administered prices"¹⁵⁴ in concentrated industries might not remain indifferent if the second and fifth largest steel producers, with total capacity in excess of that of the United Kingdom,¹⁵⁵ were, in order to attain greater efficiency, allowed to unite their three billion dollars of assets¹⁵⁶ under common control. Amended section 7 was itself in large part a political response to the decision of the Supreme Court in *Columbia Steel*, allowing acquisition by United States Steel of a small fabricator.¹⁵⁷ In addition, economists advocate public regulation for industries in which optimum efficiency is demonstrated at a very high level of output, such as classical declining cost industries.¹⁵⁸ Hence, both politically and economically, large mergers for efficiency, if sanctioned, might present a case for more restrictive industry controls.

Furthermore, if an efficiency defense were permitted, courts would face vast

153. See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 347 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (In the absence of Sherman Act protection against monopoly power "the demand for public regulation, public ownership, or other drastic measures would become irresistible in times of crisis. Dispersal of private economic power is thus one of the ways to preserve the system of private enterprise.").

154. N.Y. Times, April 26, 1959, § 4, p. 2, col. 6 (Senate subcommittee considering proposals for FTC hearings before price increases in concentrated industries); *Hearings Pursuant to S. Res. 231 and S. Res. 57 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pts. 9 & 10 (1959). Dale, *Debate on "Administered Prices,"* N.Y. Times, March 22, 1959, § 4, p. 7, col. 3; Senate Subcommittee on Antitrust and Monopoly, *A Study of Administered Prices in the Steel Industry*, S. REP. No. 1387, 85th Cong., 2d Sess. (1958). *But see Administered Price?—A Hard Look at Competition in the Steel Industry*, Barron's, Oct. 20, 1958, p. 5.

155. Compare Findings No. 62 (Youngstown and Bethlehem had a combined capacity, as of January 1, 1958, of 29.5 million tons), with N.Y. Times, Jan. 2, 1959, p. 35, col. 3 (estimated steel-making capacity of the United Kingdom as of January 1, 1959, was 26.2 million tons; of West Germany, 31.5 million tons).

156. Findings No. 60; see *The 300 Largest Manufacturers in 1957*, 16 CONF. BD. BUS. REC. 181, 182-83 (1959) (Bethlehem the 11th largest and Youngstown 52d in terms of total assets).

157. *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). The importance of this decision in bringing forth the 1950 amendment is discussed in note 20 *supra* and accompanying text.

158. Edwards, *Public Policy in a Free Enterprise Economy*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 508, 534 (Adams ed. 1950); WILCOX, *PUBLIC POLICIES TOWARD BUSINESS* 498 (1955); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955) ("if the economies of scale are substantial, then competition cannot be used to regulate the industry").

difficulties in determining which acquisitions deserved legal approval.¹⁵⁹ Quite clearly, all mergers do not promote efficiency, and reliable criteria for separating the economic from the uneconomic would be required. Whether the assets of two corporations will function more efficiently combined than separate depends upon alleged economies of multiplant operations (which must be distinguished from economies associated with larger single plants). Neither economists nor businessmen have been able to devise tests for assessing the economic impact of particular multiplant consolidations; studies of the general level of efficiency in some industries with multiplant firms have just begun.¹⁶⁰

One measure of multiplant economies of scale which has been suggested is the "survivor test":¹⁶¹ those firms which survive and increase their market share are presumed efficient, while those which fail or lose in market share are deemed less efficient. Hence, according to this view, when a firm, in a size range in which survival and increase in market share had been demonstrably less prevalent, merges, the consolidation will result in economies of scale. This survivor test is said to be the only measure of a firm's ability to cope with all the problems of doing business: buying resources, dealing with labor, finding customers, introducing new products, coping with fluctuations. Any test based upon cost factors alone, advocates of the survivor test contend, would fail to account for many of the realities of corporate life.¹⁶²

On the basis of the few survivor-test studies which have been made, it may be concluded that the range of efficient firm size is very broad in most industries¹⁶³—for example, all steel producers with more than 2.5 per cent but less

159. See COOK, *EFFECTS OF MERGERS* 433 (1958). After analyzing the role of mergers in six major manufacturing industries in the United Kingdom, Cook concluded that economies of scale and efficiency played a different role in each.

160. See BAIN, *BARRIERS TO NEW COMPETITION* 83 (1956); Stigler, *The Economies of Scale*, 1 J.L. & ECONOMICS 54 (1958) ("[A]ll economists have been ignorant of the optimum size of firm in almost every industry all of the time."); MASON, *op. cit. supra* note 140, at 355; Smith, *Survey of the Empirical Evidence on Economies of Scale*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 213, 230 (1955).

161. See Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 26 (Supp. 1950); Bowman, *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 587-89 (1953); Stigler, *supra* note 160, at 64.

162. See authorities cited note 161 *supra*.

But others, while suggesting no alternative, say that the survivor test is imprecise and measures too much. Survival, they point out, reflects not only economic efficiency, but also monopoly bargaining power, political influence, and every other noneconomic factor which might improve profit margins. In addition, market imperfections, which allow firms to withstand significant disadvantages of small scale and survive on the "starvation margin," may distort survivor-test data. Further, the survivor test applied on an industrywide basis may improperly include firms which produce varying product lines, or a smaller range of products. Finally, it is argued, when absolute output has increased or remained stable, long run decline in the market share of large firms fails to prove that there are diseconomies of scale. See Bain, *Capitalism and Monopolistic Competition—Discussion*, 40 AM. ECON. REV. 63, 65 (Supp. 1950); MASON, *op. cit. supra* note 140, at 355-57; WESTON, *THE ROLE OF MERGERS IN THE GROWTH OF LARGE FIRMS* 62-66 (1953).

163. Stigler, *The Economies of Scale*, 1 J.L. & ECONOMICS 54, 71 (1958) ("Perhaps

than twenty-five per cent of industry capacity fall within the efficient size range.¹⁶⁴ This conclusion accords with that of critics of the survivor test,¹⁶⁵ and indicates that a merger-for-efficiency defense would have limited application. Since one of two merging firms would seldom fall below the wide range of efficient size, merger would rarely spell cost savings or greater production. In practice, therefore, an efficiency defense could rarely be established.

If one of the merging firms is so inefficient that it is unable to survive, the merger would escape illegality under the "failing company" doctrine, which will be discussed in the succeeding section.¹⁶⁶ Furthermore, in the few non-failing-company cases where merger and efficiency might be established as inextricably related, consolidations would ordinarily not violate the statute. Firms that fall below efficient levels of output are likely to be the smallest in the industry, with insignificant or declining market shares. For example, when six automobile producers,¹⁶⁷ with Antitrust Division approval, partly based on efficiency, merged to form Studebaker-Packard, American Motors, and Kaiser-Willys, none had more than 1.5 per cent of the market.¹⁶⁸ Since the Big Three were selling ninety-five per cent of all automobiles,¹⁶⁹ it is doubtful that a court would have found that the consolidations substantially lessened competition or tended to create monopolies. Similarly, in none of the old section 7 cases in which courts imputed importance to economies of scale did efficiency appear relevant to the decision; none of the mergers, it seems, would have created an illegal degree of market power.¹⁷⁰

By equating market power with social and economic benefit, and claiming that deterioration of competition can be justified by advances in efficiency, the merger-for-efficiency contention runs counter to the basic tenets of antitrust

the most striking finding of our exploratory studies is that there is customarily a fairly wide range of optimum sizes . . .").

164. *Id.* at 58; see Adams, *The Steel Industry*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 148, 189 (rev. ed. Adams 1955); Bowman, *Toward Less Monopoly*, 101 U. PA. L. REV. 577, 600 (1953); BAIN, *BARRIERS TO NEW COMPETITION* 86 (1956).

165. Bain, *Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries*, 44 AM. ECON. REV. 15, 39 (1954) ("such economies generally are unimportant after all"); BAIN, *op. cit. supra* note 164, at 89, 112-13, 211.

166. Text at notes 178-212 *infra*.

167. See Stigler, *supra* note 163, at 61 (economies of scale in automobile industry require large market share); COOK, *EFFECTS OF MERGERS* 431 (1958) (same in United Kingdom); BAIN, *op. cit. supra* note 164, at 81.

168. 1955 *Hearings* 298 (statement of Stanley N. Barnes, Assistant Attorney General); *id.* at 443 (statement of George Romney, President of American Motors Corp.); *id.* at 853 (statement of James J. Nance, President of Studebaker-Packard Corp.).

169. *Id.* at 298.

170. Note 137 *supra* and accompanying text; see *V. Vivaudou, Inc. v. FTC*, 54 F.2d 273, 275-76 (2d Cir. 1931) (two small cosmetics producers whose products were found to be noncompetitive); *Temple Anthracite Coal Co. v. FTC*, 51 F.2d 656, 660 (3d Cir. 1931) (two depression-hit coal producers with an inconsequential market share). The only possible exception is *United States v. Republic Steel Corp.*, 11 F. Supp. 117, 118-19 (N.D. Ohio 1935) (producer with 7.2% of steel capacity and producer with 1.5% during mid-depression when operations below 40% of capacity).

legislation. The policies embodied in the Sherman and Clayton Acts go beyond considerations of economic efficiency.¹⁷¹ They manifest a congressional desire to restrain inordinate private power over the level of output, employment, and prices in significant sectors of the national economy. They reflect antipathy toward what Judge Learned Hand has called the "indirect social or moral effect" of a system in which "the great mass of those engaged must accept the direction of a few."¹⁷² The congressional attack upon excess market power should be viewed as a mandate to risk inefficiency, if necessary, to avoid excessive agglomerations of private power.¹⁷³

Therefore, courts have refused to pay heed to claims of economic benefits in cases involving the Sherman Act offenses of monopolization and restraint of trade.¹⁷⁴ Clayton Act prohibitions of incipient monopoly and oligopoly power require the same interpretation.¹⁷⁵ True, it has been suggested that monopoly "thrust upon" a Sherman Act defendant by greater efficiency might not constitute an actionable violation.¹⁷⁶ But, apart from the "failing company" situation, consolidation could not be said to be forced upon the merging firms. If both have survived in the market, that is the best measure available of their ability to exist as efficient, independent units. This history of survival renders arguments of efficiency even less significant in section 7 cases than in Sherman Act litigation. Under the latter statute, courts are called upon to break up going economic enterprises. The anticipated efficiency of the smaller units resulting from dissolution is more speculative, and the economic cost of a mis-

171. For a discussion of the policy of the Sherman and Clayton Acts, attacking market power without reference to efficiencies, see authorities cited notes 2-6 *supra* and accompanying text.

172. *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945), quoted in *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

173. See *United States v. Aluminum Co. of America*, *supra* note 172, at 429 ("Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."). *But cf.* GALBRAITH, *AMERICAN CAPITALISM—THE THEORY OF COUNTERVAILING POWER* ch. IX (2d ed. 1956) (absence of traditional intraindustry competition must be accepted; but excess corporate power is held in check by big labor and big government). *Contra*, ADAMS & GRAY, *MONOPOLY IN AMERICA* vii (1955) ("government often supports, rather than countervails, the forces making for concentration").

174. See *American Tobacco Co. v. United States*, 328 U.S. 781, 813 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); ATT'Y GEN. REP. 52; ADAMS & GRAY, *MONOPOLY IN AMERICA* vi (1955).

175. See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (1958); *Aluminum Co. of America v. FTC*, 284 Fed. 401, 408 (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923).

176. *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-30 (2d Cir. 1945). The Attorney General's Committee has advocated the "thrust upon" suggestion as a complete defense. ATT'Y GEN. REP. 56-60.

take in judgment by the court is greater, than when the issue is whether two profitable businesses will be more efficient if they combine.

In addition, if bigness, and therefore large investment, is necessary for efficiency, entry of new firms to the industry will be more difficult. Increases in market share and withdrawal of competitors will thus work lasting injury to competition. And, if courts were called upon to balance efficiency against market power, they would be dealing with phenomena which could not usefully be compared. Findings that efficiency would be increased eleven per cent and market power ten per cent, even if such findings are possible, would not conclude the issue in favor of merger. A court might well believe that a fifteen per cent, or fifty per cent, increase in efficiency was needed to justify a ten per cent increment in market power. But nowhere in economic literature or legal precedent would courts find ways to balance market power with efficiency. Nor would the presumed expertise of the FTC seem adequate to make such determinations.¹⁷⁷

Mergers for Survival—Problems of the Failing Company

Instances may arise when consolidation is a firm's only means of survival. Hence, in the old section 7 case of *International Shoe*,¹⁷⁸ the Supreme Court allowed a merger, which the FTC had concluded would violate the statute,¹⁷⁹ because the acquired corporation's "resources [were] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure."¹⁸⁰ The Court conditioned its approval of the merger with the largest firm in the industry on the unavailability of an alternative purchaser.¹⁸¹ This doctrine has been consistently followed in the litigated cases,¹⁸² and has been applied by the enforcement agencies in their merger clearance procedures.¹⁸³ In addition, it was recognized in the legislative history of new

177. See COOK, EFFECT OF MERGERS 442 (1958) ("Only in a small number of more simple cases . . . is it possible to reach any definite judgment as to whether or not a merger is in the public interest.").

178. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) (alternative holding).

179. *International Shoe Co.*, 9 F.T.C. 441 (1925). The Court of Appeals had agreed with the Commission. *International Shoe Co. v. FTC*, 29 F.2d 518 (1st Cir. 1928).

180. 280 U.S. at 302.

The acquired corporation had a \$4 million deficit at the time of merger, owed \$15 million to banks, and owed \$2 million on current account. *Id.* at 300.

181. *Id.* at 302-03.

182. *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958), *appeal docketed*, 27 U.S.L. WEEK 3351 (U.S. May 22, 1959) (1958 Term, No. 942); *In re Pressed Steel Car Co.*, 16 F. Supp. 329, 338-39 (W.D. Pa. 1936) (company already in bankruptcy); see *Beegle v. Thomson*, 138 F.2d 875, 880-81 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944) (dictum). For an earlier case see *Aluminum Co. of America v. FTC*, 299 Fed. 361, 365 (2d Cir. 1924). See also *American Press Ass'n v. United States*, 245 Fed. 91, 93-94 (7th Cir. 1917) (Sherman Act does not prohibit failing company merger).

183. Barnes, *Mergers*, in 1955 ANTITRUST LAW SYMPOSIUM 49 (CCH 1955); 1955 *Hearings* 326-27 (Statement of Stanley N. Barnes); 1 TRADE REG. REP. ¶ 4207.105 (letter

section 7.¹⁸⁴ Often regarded as a well-defined rule, the *International Shoe* doctrine, on close analysis, presents vexing problems of interpretation and administration.¹⁸⁵

Because it avoids misallocation of resources, *International Shoe* is economically justified. The fact that a company is unable to survive is the best indication that its assets are not being employed most efficiently.¹⁸⁶ While multiplant economies in non-failing-company consolidations are probably too speculative to permit an otherwise illegal merger,¹⁸⁷ the inability of a firm to survive is sufficient basis for an inference that merger will increase efficiency substantially.

Conceptually, a failing-company merger, in the absence of an alternative purchaser, may not constitute a substantial lessening of competition under section 7.¹⁸⁸ Prohibition of the merger would result in withdrawal of the failing company's assets from the market, and the stimulus to competition provided by the failing company would be lost. Except in rapidly declining industries, where large firms have suffered continuing financial reverses, the contribution to competition afforded by a failing company will rarely be significant.¹⁸⁹ True, the acquiring firm will increase its market share through the sales of the revived failing company. But even if the consolidation is banned, the acquiring corporation would increase its market share to the extent that it began supplying the customers of its insolvent competitor. For example, suppose seller *A* with eighty-five per cent of the market acquired failing seller *B* with five per cent, and remaining seller *C* possesses ten per cent.¹⁹⁰ If *A*

from Victor R. Hansen, Assistant Attorney General, to Frank Bartholomew, President, United Press International, May 29, 1958, approving merger of United Press and International News Service under the *International Shoe* doctrine).

184. S. REP. NO. 1775, 81st Cong., 2d Sess. 7 (1950); H.R. REP. NO. 1191, 81st Cong., 1st Sess. 6 (1949); ATT'Y GEN. REP. 123.

185. For brief discussions of the doctrine see Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179, 269 (1932). Note 45 VA. L. REV. 421 (1959); Comment, 46 ILL. L. REV. 444, 460-62 (1951).

186. For a discussion of the "survivor test" as the best measure of efficiency, see notes 161-62 *supra* and accompanying text.

187. See text at notes 159-65 *supra*.

188. 280 U.S. at 302-03 (a failing company merger "does not substantially lessen competition . . . within the intent of the Clayton Act"); *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958), *appeal docketed*, 27 U.S.L. WEEK 3351 (U.S. May 22, 1959) (1958 Term, No. 942) (a failing company merger "cannot result in lessening competition"); Address by Bethuel M. Webster, *The Clayton Act Today: Merging and Marketing*, New York State Bar Association Section on Antitrust Law, 11th Annual Meeting, January 29, 1959, p. 9 ("[W]hen an acquired company meets the *International Shoe* test, a statutory exception is not necessary, since competition can not be lessened by the elimination of an enterprise that was unable to compete.").

189. In most industries only firms with insignificant and declining market shares will suffer diseconomies of scale. See notes 163-70 *supra* and accompanying text.

190. These facts approach those in *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 808 (D.D.C. 1958), *appeal docketed*, 27 U.S.L. WEEK 3351

were better situated than *C* to supply *B*'s customers—because *A* has excess capacity, or *A* can more readily expand, or *A*'s plant is better located—*A* would achieve a ninety per cent market share, or at least more than eighty-five per cent, even if the merger were forbidden and *B* failed. Of course, merger would hand *B*'s customers to *A* without potential competitive struggle for them with *C*. But such struggle presumably would not have a far-ranging impact; most likely, *A* and *C* would merely continue their normal sales efforts, particularly if the product is one offered to the general public.

If the increased concentration resulting from a failing-company merger does constitute a substantial lessening of competition,¹⁹¹ justification can be found in the legislative history of section 7. While the statutory language makes no allowance for subordinating antitrust objectives to considerations of resource allocation, *International Shoe* was approved in the congressional reports which led to the 1950 amendment.¹⁹² The doctrine could thus be deemed a legislatively approved judicial exception to the statute, codification of which Congress regarded unnecessary, probably because it felt failing-company mergers could not work substantial injury to competition.

Before applying *International Shoe*, courts should determine whether the acquired firm is unable to survive as an independent enterprise. If the company will survive in the absence of merger, the doctrine would seem inappropriate; only the probability of discontinued operations would render the acquirer's increased market power unimportant. Ability to survive is essentially a question of fact:¹⁹³ in the absence of merger, would the company involuntarily leave the market? Financial insolvency, neither in the "equity" sense (inability to pay debts as they become due), nor in the "bankruptcy" sense (excess of liabilities over assets),¹⁹⁴ should not be conclusive of inability to survive.¹⁹⁵ Maturities might be met or debt redressed by obtaining funds on the capital market, or by financial reorganization not involving partial or total liquidation of assets.¹⁹⁶ In resolving this fact issue, courts may find some guidance in the causes of the company's decline. For example, reverses which are

(U.S. May 22, 1959) (1958 Term, No. 942), but *B*'s market share is somewhat obscure in the opinion. The Government's litigation was primarily directed at *A*'s acquisition of *C*, which is not here relevant.

191. See Note, 45 VA. L. REV. 421, 427 (1959).

192. See note 184 *supra* and accompanying text.

193. Once determined, the fact would be subject to appellate review in accordance with FED. R. CIV. P. 52(a). See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 599 n.28 (1957) ("findings of fact shall not be set aside unless clearly erroneous"). And FTC findings, "if supported by substantial evidence, shall be conclusive." 38 Stat. 736 (1914), as amended, 15 U.S.C. § 21 (1952); *FTC v. International Paper Co.*, 241 F.2d 372, 373 (2d Cir. 1956) ("The Clayton Act clearly recognizes that a court of appeals has no fact finding powers. . .").

194. See COLLIER, BANKRUPTCY MANUAL ¶ 1.09 (2d ed. Edelman 1954).

195. For a discussion of the inconclusive history of the meaning of "failure," see Note, 45 VA. L. REV. 421, 423-24 (1959).

196. The opinion of the majority in *International Shoe* seems to accept the view of the lower court, *International Shoe Co. v. FTC*, 29 F.2d 518, 522 (1st Cir. 1928), that if new bank credit, receivership, or financial reorganization were viable possibilities the

linked to a cyclical market swing, rather than a secular decline in the firm's fortunes, are less likely to manifest inefficiencies which impair survival.¹⁹⁷

In determining inability to survive, a trier of facts is faced with the difficult task of evaluating management's opinion that consolidation is the only route to continued market participation.¹⁹⁸ An interval between consummation of the merger and section 7 litigation may obscure the facts and provide opportunities for subterfuge. For example, the acquirer could "milk" the acquiree's facilities in anticipation of suit. Because of such possibilities for abuse, and because financial data are more readily available to them,¹⁹⁹ defendants should have the burden of proving that survival is not possible in the absence of merger.²⁰⁰

merger should be disallowed. 280 U.S. at 302. See *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36461 (1957) (failing company doctrine not applicable to acquisition which it was alleged would enable continuation of a modernization program of a highly solvent company).

197. The dissenters in *International Shoe* were of the opinion that the acquired company's misfortunes resulted from a temporary 1920-1921 recession in the shoe market. 280 U.S. at 306. In *Aluminum Co. of America v. FTC*, 284 Fed. 401. (3d Cir. 1922), *cert. denied*, 261 U.S. 616 (1923), an independent aluminum fabricator was caught in a government-imposed price squeeze. Under World War I ceilings, the price of ingot, supplied only by Alcoa, was fixed at 32¢ per lb., while the price for rolled sheet, produced by the fabricator, was set at only 40¢. The fact that the fabricator's operations were thus temporarily unprofitable was held not to justify a merger with Alcoa. 284 Fed. at 403. For subsequent history of the case, see *Aluminum Co. of America v. FTC*, 299 Fed. 361 (3d Cir. 1924); 2 WHITNEY, ANTITRUST POLICIES—AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 88 (1958) (mill closed as obsolete).

198. See Barnes, *Mergers*, in 1955 ANTITRUST LAW SYMPOSIUM 49, 50-52 (CCH 1955). In *Crown Zellerbach Corp.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 26923, at 36641 (1957), the FTC refused to accept management's judgment that the modernization program of the acquired firm could not have been completed in the absence of merger, and the Commission rejected defendants *International Shoe* contention.

The history of *International Shoe* itself exemplifies the difficulty of second-guessing management. The FTC, *International Shoe Co.*, 9 F.T.C. 441. (1925), the lower court, 29 F.2d at 522, and the dissenters (Stone, Holmes, and Brandeis, JJ.), 280 U.S. at 306, thought that the company could have been rehabilitated, but the majority gave management's judgment that merger was necessary for survival a "presumption of rightfulness," 280 U.S. at 302.

199. The Federal Trade Commission has power to demand corporate documents. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1952). But FTC investigators may be unable to subpoena information most pertinent to the inquiry unless they are given access to company files to determine what material is available. Counsel generally refuse such access. Decker, *Antitrust Investigations From the Business Lawyer's Viewpoint*, 2 ANTITRUST BULL. 111, 114, 116 (1956). The Antitrust Division may obtain compulsory process only by the cumbersome procedure of convening a grand jury. *Id.* at 114-15. A pending bill, which has received subcommittee approval in the Senate, would give the Antitrust Division power to secure corporate records without subpoena. *Wall Street Journal*, May 4, 1959, p. 4, col. 2.

200. See 1955 *Hearings* 326 (Statement of Stanley N. Barnes) (defendants must "show first that they are what can be considered a failing corporation."). Nor would it seem proper to create a presumption in favor of management's judgment as did the majority in *International Shoe*. 280 U.S. at 302.

The failing company may be an insolvent division or subsidiary of an otherwise successful firm. In such a case, if competition would be substantially lessened in markets other than those in which the division or subsidiary operates, *International Shoe* should not be available to justify a merger involving the entire company.²⁰¹ Further, since rehabilitation under present ownership is often feasible, separate sale of an insolvent division or subsidiary to a competitor deserves critical review. Thus, the sale by Curtis Publishing Company of its consistently unprofitable farm magazine to the publisher of the leading rural periodical was held illegal. According to the FTC, Curtis could have "revitalized" the publication, which would not have been discontinued in the absence of merger.²⁰²

The most difficult *International Shoe* problems arise when an alternative purchaser is or might be available.²⁰³ The inability of a firm to survive may be cured by merger with various firms. Section 7 problems will occur, of course, only when the failing company seeks to merge with a competitor, and will be most acute when the would-be acquirer possesses a considerable market share. Such a competitor will often offer the highest price for the assets, in anticipation of increased profits as a result of greater market control. Consummation of the failing-company merger may therefore foreclose purchase by other firms.

If an alternative purchaser with substantially less market power, capable of employing the failing company's assets with reasonably comparable efficiency, is thus foreclosed, the merger could contravene section 7. Assuming that the alternative purchaser is ready and willing to buy, "but for" the merger a more competitive market situation would obtain, and, therefore, the merger lessens competition.²⁰⁴ The substantiality of this lessening would normally be determined by the change in industry concentration caused by the merger. The degree of market concentration existent after the merger is another possible test.²⁰⁵

The greater the disparity in market power between the acquirer and the alternative purchaser, the more injury to competition could be curtailed by prohibiting the merger. The most desirable alternative purchaser would be one not already in the same market, who could stimulate competition in the industry through independent decisions.

201. See *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 594-95 n.13 (1957) ("... if the forbidden effect or tendency is produced in *one* out of *all* the various lines of commerce, the words 'in *any* line of commerce' literally are satisfied."); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958).

202. *Farm Journal, Inc.*, TRADE REG. REP. (1956-1957 FTC Cas.) ¶ 26023; *id.* ¶ 26127 (1956).

203. The alternative purchaser requirement is well-embedded in the doctrine. See 1955 *Hearings* 326; Barnes, *Mergers*, in 1955 ANTITRUST LAW SYMPOSIUM 49, 50 (CCH 1955); ATT'Y GEN. REP. 123. But see Note 45 VA. L. REV. 421, 427 (1959) (questioning the relevance of the requirement).

204. The "but for" test of illegality is set forth in text preceding note 84 *supra*.

205. See text accompanying notes 84-85 *supra*.

To obviate competitive injury resulting from foreclosure of an alternative purchaser, the courts and enforcement agencies should, following this analysis, require that opportunity exists for public bidding. Since the high price offered by a dominant competitor may be designed to outbid industry rivals in order to reap higher profits from increased industry control, alternative buyers should be allowed to come forward with lower bids. Hence, the Antitrust Division procedure in approving the recent acquisition by the New Orleans *Times-Picayune* of its only competitor in the city's daily newspaper market²⁰⁶ appears unwise. The Division required that other potential buyers match the *Times-Picayune* offer²⁰⁷ which, since it led to unitary control of New Orleans newspapers, may have been inflated by anticipated monopoly profits.

If the firms seek approval of the Antitrust Division or the FTC through their merger clearance procedures, as did *Times-Picayune*, the enforcement agency can withhold consent, or, if necessary, the Antitrust Division can seek injunction, unless the parties publicly and fairly request alternative bids.²⁰⁸ But, if firms know that the enforcement agencies will pursue such a policy, they are unlikely voluntarily to seek clearance and submit themselves to the requirement of public bidding and the possibility of injunction. Adoption of the pending legislation requiring sixty-day notice of all significant mergers, and giving the FTC merger injunction power,²⁰⁹ would therefore seem essential to guarantee public bidding. If this legislation is not enacted, firms may acquire failing companies before there has been an opportunity for alternative purchasers to make offers; indeed, the merger may reach court a *fait accompli* after many months have elapsed.²¹⁰ When the operations of the failing company have thus become integrated with those of the acquiring firm, other buyers may no longer be forthcoming; and, in any event, subsequent divestiture and sale is vastly more difficult and less desirable.²¹¹

206. *Antitrust Newsletter*, 3 ANTITRUST BULL. 594 (1958).

207. *Ibid.* Also, the buyer would be required to pay *Times-Picayune* \$75,000 for expenses.

208. The Federal Trade Commission cannot now seek merger injunction. *FTC v. International Paper Co.*, 241 F.2d 372 (2d Cir. 1956).

209. The pending bill, which has received subcommittee approval in the Senate, would require 60-day notice when the combined assets of the merging firms exceed \$10 million. *Wall Street Journal*, May 8, 1959, p. 4, col. 2. A text of the Administration bill originally proposed in 1956 appears in 1 ANTITRUST BULL. 669 (1956). See Hansen, *Current Problems and Policies of the Antitrust Division*, 2 ANTITRUST BULL. 437, 441 (1957); Riehm & Billyou, *A Comment on the Proposed Notice Legislation*, 2 ANTITRUST BULL. 195 (1957).

210. Illegality may be found for mergers which occurred as much as 30 years ago. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). See also *Kroger Co.*, 3 TRADE REG. REP. ¶ 27885 (FTC April 1, 1959) (complaint challenging acquisition made 31 years ago); *Scott Paper Co.*, TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27716 (Jan. 5, 1959) (merger which occurred in 1951 still in the process of litigation).

211. See Comment, 46 ILL. L. REV. 444, 461-62 (1951); *Farm Journal, Inc.*, TRADE REG. REP. (1956-1957 FTC Cas.) ¶ 26127 (1956).

Short of injunction, a court may order the acquiring firm to maintain separate finan-

If public bidding discloses one or more alternative purchasers, the courts and agencies should determine whether to bar the proposed merger and, by so doing, force the owners of the failing company to sell to another—and invariably lower—bidder. This determination will of necessity be most complex and speculative. It will turn, first, upon whether the alternative use will be a reasonably economic employment of the failing company's assets. Thus a court may conclude that the conversion of a broiler factory to toasters would be a tenable alternative to acquisition by a dominant broiler maker, but that conversion of the plant to a warehouse, and sale of the equipment as junk, would misallocate resources. But this problem of asset employment in presumably separate lines of commerce would rarely arise. Since the dominant firm's willingness to continue a failing plant in its present capacity would point to the plant's continued utility in the same industry, other bids would normally be forthcoming from the dominant firm's rivals. Second, the court or agency would have to determine if market concentration resulting from the merger would be substantially greater than that resulting from the alternative purchase. The effect upon market concentration of the merger, as compared with the alternative purchase, may be estimated by employing the usual criteria of illegal market power under section 7.

If it is determined that acquisition by a lower bidder would result in substantially less market concentration, the statute would seem to call for a presumption in its favor. That the dominant firm might employ the failing company's assets more efficiently than others in the industry would not alter this presumption. The problem of which firm will achieve the greatest efficiency is often insoluble, and efficiency cannot profitably be balanced against increased market power.²¹² Finally, the *International Shoe* doctrine looks only to survival in the industry, not to maximization of efficiency. So long as the acquirer can put the failing company's assets to sound uses, it would seem irrelevant that an acquisition, which would more adversely affect competition, would also result in the utmost efficiency.

Mergers for Expansion—Problems of Increasing Productive Capacity

The principal attempt to justify the merger prohibited by *United States v. Bethlehem Steel Corp.*²¹³ was the argument that consolidation would enable defendants to develop facilities in the Chicago area for the production of heavy structural steel,²¹⁴ which was allegedly in "deficit" supply in the midcontinent.²¹⁵ This expansion, it was contended, could not feasibly be accomplished

cial data to minimize difficulties of a subsequent divestiture order. *United States v. Brown Shoe Co.*, 1956 Trade Cas. 71109 (E.D. Mo.).

See also note 4 *supra*.

212. See text at notes 159-65, 177 *supra*.

213. 168 F. Supp. 576 (S.D.N.Y. 1958).

214. Brief for Defendants, June 23, 1958, pp. 19-21; 168 F. Supp. at 616.

215. Brief for Defendants, June 23, 1958, p. 5 (heavy structural shapes and plates have been in "critical short supply for many years"); *id.* at 15-16 (the midcontinent and

without the merger.²¹⁶ Thus, the merger-for-expansion rationale is but a more specific extension of the merger-for-efficiency argument.²¹⁷ While expansion of output is often of crucial importance, total merger of competing firms is not the only or best way to achieve needed economic growth. The court's conclusion in *Bethlehem*, that expansion projects fall outside the ambit of judicial inquiry in section 7 cases, appears correct.²¹⁸

Higher capital costs are said to be the principal barrier to independent implementation of a proposed expansion by either merging firm.²¹⁹ Arguably, economies of scale and the greater size and stability of the combined firm will make the necessary funds available on more favorable terms. Multiplant economies of scale are normally too doubtful, however, to be determinative of whether a consolidated company will better absorb capital costs.²²⁰ Further, alleged reductions in capital costs may in part reflect anticipated higher profits deriving from enhanced market power—not efficiency—of the merged firm, and thus may divert investment from smaller, perhaps more efficient, industries to oligopolies.²²¹ This result seems too contrary to the thrust of section 7 to provide the basis for a justification of the statute's contravention. Insofar as greater diversity and stability, rather than economies of scale, render capital cheaper, a conglomerate merger, which does not substantially lessen competition, could have the same result. It is highly unlikely, therefore, that a horizontal merger will be essential to obtain capital for expansion. This conclusion is reinforced by the fact that the merger-for-expansion argument will be forthcoming only when new facilities appear economically essential. And, the more urgently new capacity is needed, the more readily funds will be available without anticompetitive merger. If the new output would meet

Chicago areas will experience "the greatest future growth in consumption of finished steel product."); Findings No. 398.

216. Brief for Defendants, June 23, 1958, p. 22 (Chicago expansion "would be an imprudent expenditure of . . . [Bethlehem's] available funds"); *id.* at 26-27 (Youngstown could not generate funds, issue securities, or obtain outside financing).

217. See text at notes 134-77 *supra*.

218. 168 F. Supp. at 617.

219. See authorities cited note 139 *supra*. For a discussion of capital requirements as a barrier to entry to new markets, see BAIN, *BARRIERS TO NEW COMPETITION* 166 (1956). Bethlehem fortified its position with the argument that construction costs, in addition to capital costs, could be lowered by the acquisition. Youngstown's facilities could be expanded at a cost of \$358 million or \$135 per ingot ton. Estimated cost of a new integrated facility—which Bethlehem claimed was the only viable alternative—was \$750 million or \$300 per ingot ton. Brief for Defendants, June 23, 1958, p. 22. For Youngstown, of course, construction costs would be roughly the same, with or without merger. The Government questioned whether Bethlehem could not, in the absence of merger, build a Chicago plant with a limited range of products—primarily heavy structurals—at considerably lower cost than a complete integrated facility. Plaintiff's Brief After Trial, p. 88.

220. See Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 27 (Supp. 1950).

221. See DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 33 (1959).

assured demand—would cater to a “deficit area” for example—capital should be plentiful on reasonable terms.²²²

It has also been argued that only merger will make essential personnel available to expanding firms.²²³ If acquisition of personnel by one firm is the reason for the merger, personnel costs will be reflected in the merger's terms. Funds, which would otherwise be consumed in the exchange of shares or the price paid for the consolidation, might therefore be utilized for training programs or more attractive salaries, which would enhance the firm's fund of managerial or technological talent. A firm should have little difficulty in attracting qualified personnel at salaries it can afford if the expansion will cater to an assured market—if it is a truly essential expansion. In some cases, the high cost of personnel may indicate that the needed ability is scarce. If so, the market will be one in which entry is highly difficult, and the anticompetitive effect of the merger will be correspondingly increased.²²⁴

If expansion projects were heard to rebut a violation of section 7, administrative problems would be close to insurmountable. First, courts (or the FTC) would be forced to second-guess management's judgment that merger is a prerequisite to expansion. Information essential to this determination—interest rates, costs of construction, expected return on investment, abilities of management, cost of obtaining or training personnel, economies of scale—is uniquely available to the merging firms,²²⁵ who are “interested” parties.²²⁶ Further, if it were found that merger was essential to expansion, a court (ex-

222. See HANSEN, *THE AMERICAN ECONOMY* 34-37 (1957) (funds for expansion of facilities have been readily available).

If capital barriers do in fact deter needed expansions, Congress could lower them by allowing rapid amortization of new facilities for tax purposes. Cf. INT. REV. CODE OF 1954, § 168 (5-year amortization of emergency defense facilities); Findings No. 396 (U.S. Steel received rapid amortization with respect to \$468 million of the approximately \$600 million cost of its Fairless Works, constructed during the Korean conflict).

223. 168 F. Supp. at 616 (“Youngstown claims it is without the know-how, the experienced personnel . . . to enter into the structural shape and plate business.”).

224. See Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 494-95 (1957).

225. See note 199 *supra* for a discussion of the problem of obtaining information.

226. *Bethlehem* illustrates the problem of evaluating management contentions. Despite contrary expression of its capabilities and intentions, it now appears that Bethlehem will build in the Chicago area. N.Y. Times, Jan. 28, 1959, p. 39, col. 1 (statement by A. B. Homer, President of Bethlehem, that the company has “already proceeded” to study building on its 4,000 acres of Chicago property); *Bethlehem-Youngstown: Controversial Engagement*, Fortune, June 1957, pp. 145, 188 (Bethlehem reportedly would have built on its Chicago area tract whether the merger was blocked or not).

Although defendants estimated that a new integrated facility with 2.5 million tons of ingot capacity would cost \$300 per ton, little Barium Steel Corporation (less than \$20 million current net assets, 1959 MOODY'S INDUSTRIALS 2151, col. 2) has announced plans to construct a new integrated facility—including capacity for heavy structurals—with 2 million tons of ingot capacity at a cost of \$178 per ton. Findings No. 387. Much of the cost differential may reflect development of the cheaper and more efficient oxygen converter method of steel production since Bethlehem's estimate was prepared. Barium

exercising primary jurisdiction, or reviewing an FTC or trial-court decision)²²⁷ would then be obliged to judge whether the magnitude and economic importance of a particular program countervailed resulting competitive injury. In *Bethlehem*, Judge Weinfeld viewed expansion of slightly more than one million tons in structural-steel capacity as inadequate to warrant merger of two firms with total capacity of some twenty-four million tons of steel,²²⁸ seventy-five per cent of which they produced and sold in common markets.²²⁹ Other cases would present even more delicate problems of balancing the benefits of expansion against the detriments of increased concentration which, without guidance from legislation or legislative history, seem beyond the normal institutional capacities of courts.²³⁰ Finally, a decision that a particular expansion project justified merger would create the necessity of ensuring the project's implementation. Swings in the business cycle, stockholder objections, or management changes, all could cause cancellation or alteration. Perhaps merger could be made contingent upon expansion,²³¹ and the court could retain jurisdiction, as in consent decree proceedings.²³² But new imponderables

planned to employ this method, 1958 MOODY'S INDUSTRIALS 2846, col. 2, which accounted for nearly 40% of 1958 industry expansion, N.Y. Times, Jan. 2, 1959, p. 35, col. 3.

National Steel Corp., which ranks almost equal with Youngstown in the industry, 168 F. Supp. at 585, recently announced plans to construct a \$300 million plant in Chicago, N.Y. Times, Feb. 18, 1959, p. 45, col. 2. This compares with \$358 million estimate for the proposed expansion of Youngstown's facilities. Brief for Defendants, June 23, 1958, p. 22; see *Bethlehem-Youngstown: Controversial Engagement*, Fortune, June 1957, pp. 145, 188 ("with \$620 million of assets, Youngstown has substantially the same access to the capital market as Bethlehem" and smaller steel companies "have financed expansions proportionately much larger").

227. It is probable that the weight to be accorded an expansion program would be considered a question of law and would not therefore be subject to the limitations imposed upon court review of findings of fact. See note 193 *supra*.

228. 168 F. Supp. at 617. The court also emphasized that, in terms of total tonnage, structural shapes and plates are much less important than those products in which the defendants are principal competitors—hot rolled sheets, cold rolled sheets, and hot rolled bars, the three most important products of the steel industry. *Ibid*.

229. 168 F. Supp. at 586.

230. Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). But cf. *Baltimore & O.R.R.*, 152 I.C.C. 721 (1929). There, acquisition by the three major East-West trunk lines of a smaller competitor, 73.4% of whose freight was competitive with that of the three acquiring corporations, was held to violate § 7. The purpose of the acquisition was in part to construct a joint terminal facility for Cleveland; the acquired railroad owned the necessary property but was unwilling, for financial reasons, to join in the terminal project. When the defendants successfully evaded the divestment decree, by transferring their shares to another corporation which they controlled, a majority of the commissioners reversed themselves and held that the public interest in the new terminal outweighed the § 7 violation. *Wheeling & L.E. Ry.*, 154 I.C.C. 516 (1929). But different considerations should, and now do, apply in such regulated industries. See note 136 *supra*.

231. According to the government brief, defense counsel suggested contingent approval of the Bethlehem-Youngstown merger. Plaintiff's Brief After Trial, pp. 86-87.

232. Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?*, 68 YALE L.J. 1391, 1392 (1959).

might well arise in assessing whether deviations warranted revocation of merger consent. In addition, contingent approval might compel the implementation of projects which have, before completion, ceased to be economically desirable or feasible.

In the light of antitrust policy, an expansion-of-capacity defense meets the same objections as the mergers-for-efficiency argument.²³³ The congressional mandate makes even demonstrable economic benefits irrelevant once competitive tests of the statute have been contravened.²³⁴ Mergers which withdraw an active seller from the market, augment the industry share of the acquiring corporation, and increase concentration are no less anticompetitive because they contemplate the assembling of new plant and equipment, thereby adding to total supply.

A merger which violates section 7 in one market might effectuate an expansion plan in a separate product or section where the merging firms do not compete. Consequently, the court's statement in *Bethlehem* that a statutory violation in one market renders irrelevant demonstrable benefits in another may create concern lest minor competitive injury bar major expansion.²³⁵ Suppose, for example, that a violation of section 7 by competitors in the screw market would deny them opportunity to unite their resources and produce rare metals for defense. In practice, however, competing firms in such circumstances can avoid offending the statute by limiting their collaboration solely to markets in which they are noncompeting. This could be accomplished through either a contractual joint venture or a joint subsidiary (an incorporated joint venture). According to one estimate, some 345 joint subsidiaries, owned by the 1,000 largest United States manufacturing corporations, presently exist.²³⁶ Such subsidiaries are, it seems clear, beyond Sherman or Clayton Act proscription if their operations do not touch markets in which their owners compete—provided tacit or formal agreements to divide markets or not to compete are shunned.²³⁷ Indeed, joint ventures may introduce robust

233. See notes 171-76 *supra* and accompanying text.

234. See note 21 *supra*.

235. 168 F. Supp. 618 ("... if the proscribed effect is visited on one or more relevant markets then it matters not what the claimed benefits may be elsewhere.").

236. Martini & Berman, *Expansion Via Joint Subsidiaries*, in AMERICAN MANAGEMENT ASS'N, MERGERS AND ACQUISITIONS 83, 86-87 (1957).

237. Eaton, *Joint Ventures*, in HOW TO COMPLY WITH THE ANTITRUST LAWS 245, 248-49 (Van Cise & Dunn ed. 1954); Hale, *Joint Ventures: Collaborative Subsidiaries and the Antitrust Laws*, 42 VA. L. REV. 927, 933 (1956); Whipple, *Problems of Combination—Integration, Intra-Corporate Conspiracy and Joint Ventures*, in 1958 ANTITRUST LAW SYMPOSIUM 34, 57 (CCH 1958); Note, 4 STAN. L. REV. 559 (1952). In *United States v. Columbia Pictures Corp.*, TRADE REG. REP. (1959 Trade Cas.) ¶ 69250 (S.D. N.Y. Jan. 22, 1959), the wholly-owned subsidiary of film producer A acquired exclusive television rights for pre-1948 films of producer B. A preliminary injunction was partially denied under both § 1 of the Sherman Act and § 7 of the Clayton Act. Defendants had contended that they had never competed in the television market.

On the other hand, joint subsidiaries which necessitate "intimate association of . . . principal . . . producers in day-to-day manufacturing operations, their exchange of patent

new sellers into separate markets, decrease concentration, and diminish market power of established firms. Hence, if the market for heavy structural steel in Chicago were deemed (as it was not)²³⁸ a separate geographic and product market, a Youngstown-Bethlehem joint venture—the two companies already operate some fifteen joint subsidiaries²³⁹—would afford an alternative and less injurious means of carrying out their expansion.

Mergers for Competition—Problems of Challenging the Dominant Firm

Some defendants have contended that consolidation will allow the new corporate entity to contest the controlling position of a market leader.²⁴⁰ This argument was pursued in *American Crystal Sugar*,²⁴¹ and particularly in *Bethlehem*. In the latter, defendants argued that, only in combination, could they effectively challenge the preponderant power of United States Steel in the Chicago and national steel markets.²⁴² (As the government was quick to demonstrate, however, Bethlehem is itself dominant in some areas and some products, notably in heavy structural steel.)²⁴³

licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition *inter sese* in other markets, and violate § 1 of the Sherman Act. *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 963 (D. Mass. 1950) (dictum). Apart from this and other cases involving foreign subsidiaries, the legality of joint ventures has never been litigated. See ATT'Y GEN. REP. 88-91.

Sherman Act problems may also arise when joint ventures provide backward vertical integration into raw materials, Fusfeld, *Joint Subsidiaries in the Iron and Steel Industry*, 48 AM. ECON. REV. 578, 586-87 (Supp. 1958), or forward integration into distribution, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 151-53, 173-75 (1948); *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881 (S.D.N.Y. 1949); Rostow, *Over-all Size*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 311, 316-17 (Van Cise & Dunn ed. 1954).

238. Such a market was not discussed by the court since neither the Government nor defendants proposed it. Structural shapes and plates in Chicago would probably be part of market of the "iron and steel industry" in "the United States as a whole," however. 168 F. Supp. at 603. Hence, the expansion project would fall within a market in which defendants are competitors, and a joint subsidiary would raise serious Sherman Act issues. See authorities cited note 237 *supra*. The final judgment thus prohibits Bethlehem and Youngstown from carrying out their merger or expansion plan "in whole or in part." Final Judgment, *United States v. Bethlehem Steel Corp.*, Civ. No. 115-328, S.D.N.Y., Dec. 19, 1958.

239. Fusfeld, *supra* note 237, at 579, 582. The two firms are also associated with eight other subsidiaries. In addition, Pickands, Mather & Co., which owns sizeable interests in the Youngstown-Bethlehem subsidiaries, operates iron ore facilities owned by each of the companies individually. *Id.* at 582.

240. See Wall Street Journal, Dec. 17, 1958, p. 13, col. 4, commenting upon Diamond Crystal Salt Co., TRADE REG. REP. (1957-1958 FTC Cas.) ¶ 27643 (Dec. 2, 1958).

241. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 399 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

242. Brief for Defendants, June 23, 1958, pp. 4-5.

243. Brief in Support of Plaintiff's Motion for Summary Judgment, p. 39. Bethlehem produces 41% of the nation's structural shapes and plates against 35% for United States

But a combination of second-level competitors will be unlikely to "challenge" the dominant firm.²⁴⁴ In highly concentrated markets, it is probable that their relationship would be characterized by more usual oligopoly behavior patterns of cooperation and parallelism, giving rise to more powerful restraints on competition in the remainder of the industry.²⁴⁵ For example, it defies experience to predict that an increase in industry concentration will result in more competitive pricing, particularly if an "administered price" system is already in force in the industry (as is thought to be the case in steel).²⁴⁶ Furthermore, whether a "challenge" in fact occurs may turn upon management's state of mind, and the proposed defense thus comes close to suggesting a criterion of subjective intent.

Nor will a prospective challenge to market leaders diminish the degree to which the merger lessens competition within the meaning of section 7. Potential rivalry with the dominant firm does not refute the withdrawal of a competitor from the market, the accretion in market power, or the increase in industry concentration. The statute assumes that these factors are anticompetitive, and the contrary argument contradicts the legislation's basic tenets.

If challenge to the dominant firm were established as a defense, a cumulative merger movement might be initiated or aggravated. Once the competitive balance in an industry is upset by one merger, other firms will also seek to combine. Corporate consolidations, therefore, are thought to occur in cycles.²⁴⁷ If the number two and number five firms were allowed to combine, for example, the number three, four, and six firms would seek merger approval, in order to challenge both dominant firms. As the *Bethlehem* court pointed out,

Steel, Findings No. 278, and sells about 20% of all heavy structurals in defendant's "mid-continent" market area, Findings No. 284. Bethlehem has 70% of industry ingot capacity in the Eastern Production District of the American Iron and Steel Institute. Findings No. 38.

One recent study suggests that by "quasi-mergers" through a system of ore-producing joint subsidiaries, Bethlehem and Youngstown have already succeeded in equalling the overall industry power of United States Steel. Fufeld, *supra* note 237, at 586. Fufeld maintains that United States Steel, the Bethlehem-Youngstown group, and a "Cleveland Group" (including National Steel, Armco, Wheeling, Inland, and Republic) all share about equal industry control and that the remainder rests with scattered small producers. *Ibid.* But see Brief for Defendants, June 23, 1958, p. 11 (United States Steel is "in control of iron ore supplies" for other producers; Bethlehem itself must buy 50% of its ore); U.S. FTC, REPORT ON THE CONTROL OF IRON ORE (1952). Control of iron ore is essential to industry power because of the "strictly limited and dwindling supply." BAIN, BARRIERS TO NEW COMPETITION 153-54 (1956).

244. See *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 399-400 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *Bethlehem-Youngstown: Controversial Engagement*, *Fortune*, June 1957, pp. 145, 188.

245. See text at notes 55-74 *supra*.

246. See authorities cited note 154 *supra*; 168 F. Supp. at 587 ("There is no real price competition in the iron and steel industry.").

247. See Kraus, *Merging of Banks May Surge Again*, *N.Y. Times*, Jan. 25, 1959, § 3, p. 1, col. 7.

the result might be a market in which all firms are equal in size to the present industry leader.²⁴⁸

Creation of countervailing centers of private power is not the only means of challenging a dominant firm. A potential alternative, if the market setting compels diminution of the leader's power, might be an increased employment of the Sherman Act.²⁴⁹ This alternative is more in harmony with traditional antitrust policy.

The merger-for-competition defense has never received judicial support. Only the Antitrust Division, in approving the small automobile mergers of 1954, has taken it into consideration.²⁵⁰ The Assistant Attorney General emphasized that the decision rested upon the absence, in that rather unique industry setting, of smaller sellers who could be injured. Even so, detriment to buyers should not be ignored, particularly in a market where new entry is a remote possibility. Since the automobile mergers would probably not have violated the statute anyway,²⁵¹ the Division's reliance upon the challenge-to-dominant-firms concept is at best dubious administrative dictum which need not and should not be followed.

248. 168 F. Supp. at 618 ("we head in the direction of triopoly"); see Fufeld, *supra* note 237.

249. See Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 182 (1955) ("If the economies of scale are not substantial, the proper social policy would be to dissolve the giant firms rather than to allow mergers of the small."); Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 495 (1957).

250. 1955 *Hearings* 299 (statement of Stanley N. Barnes, Assistant Attorney General) ("Absent competitive disadvantage to smaller rivals, Congress beyond doubt intended us to consider the merger's effect on small companies' ability to compete with dominant firms.").

251. See text at notes 167-69 *supra*.